# CHAPTER 3

# FEDERAL JURISDICTION

## 3.1 Introduction.

a. The next seven chapters will deal with some of the issues raised when a military department or one of its officials is sued as a defendant in the federal courts. As you study these issues, you should begin to recognize three themes common to litigation involving the armed forces:

(1) The suits are almost exclusively in the federal courts. Unlike the state courts, which usually are courts of general jurisdiction, the federal courts are courts of only limited jurisdiction.[1] Their jurisdiction is confined to that entrusted them by Congress as limited by the Constitution.[2]

(2) Federal agencies or their officials are defendants in the lawsuits. The defenses available to federal agencies and their officials differ in both character and degree from those available to private litigants. For example, before the federal courts can award a particular remedy against the Government, the United States must have waived its sovereign immunity so as to permit such relief.[3] Moreover, standard affirmative defenses, such as the statute of limitations, may become jurisdictional in character when the United States is party to the lawsuit.[4]

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[1]Turner v. Bank of North-America, 4 U.S. (4 Dall.) 8, 11 (1799).

[2]Mayor of Nashville v. Cooper, 73 U.S. (6 Wall.) 247, 252-53 (1867).

[3]See generally United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Testan, 424 U.S. 392 (1976); United States v. Sherwood, 312 U.S. 584, 586 (1941).

[4]See United States v. Kubrick, 444 U.S. 111 (1979); Soriano v. United States, 352 U.S. 270 (1957); Finn v. United States, 123 U.S. 227 (1887); but see Irwin v. Veterans Administration, 498 U.S. 89 (1990).

(3) Military departments and their officials are involved in the litigation. The federal courts historically have treated the military services differently than other federal agencies. Because military decisionmaking is constitutionally committed to the political branches of the Government, the courts generally are more deferential to governmental determinations involving the military.[5]

b. Any determination of whether a federal court should review a particular military decision or action and, if so, to what degree it should substitute its judgment for the military's entails an analysis of five principal issues. First, does the federal court have the power to decide the particular case? In other words, is there a congressional grant of jurisdiction, does the lawsuit present a "case" or "controversy" within the meaning of article III of the Constitution, and are there prudential concerns that militate in favor of judicial abstention? Second, is the particular remedy sought by the plaintiff available from the federal courts? Third, must the plaintiff exhaust military administrative or judicial remedies before seeking relief from the federal courts? Fourth, are the particular issues raised by the plaintiff reviewable either under the Administrative Procedure Act or under the special doctrines of reviewability established in military administrative and criminal cases? Finally, assuming the court has the power to review the particular case, what is the proper scope of the court's review; that is, to what extent should the court substitute its judgment for the military's?

Chapters 3 through 8 will discuss these issues. Chapter 9 will examine the questions raised when military officials are sued personally for damages.

[5]See, e.g., Burns v. Wilson, 346 U.S. 137 (1953); Orloff v. Willoughby, 345 U.S. 83 (1953); Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

## 3.2 **Federal Judicial Power Under Article III.**

a. The judicial power of the United States is confined to the limits imposed by article III of the Constitution.[6] Article III limits the scope of federal judicial power in two ways:

(1) First, the Constitution limits the jurisdiction of the federal courts to cases that either raise certain subjects or involve certain parties.[7]

The scope of this constitutionally-derived judicial power is found in section 2 of article III, which provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority--to all Cases affecting Ambassadors, other public Ministers, and Consuls--to all Cases of admiralty and maritime Jurisdiction--to Controversies to which the United States shall be a Party; to controversies between two or more States--between a State and Citizens of another State--between Citizens of different States--between Citizens of the same State claiming lands under grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.

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Except for the Supreme Court's original jurisdiction,[8] federal judicial power under article III is not self-executing. Absent a jurisdictional statute, the federal courts cannot act even though the Constitution

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[6]Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). But cf. National Mutual Ins. Co. v. Tide-Water Transfer Co., 337 U.S. 582 (1949) (plurality opinion) (Congress can confer jurisdiction on federal courts beyond limits of Article III).

[7]Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821); Blong v. Secretary of the Army, 877 F. Supp. 1494 (D. Kan. 1995) (dismissing Adjutant General of the Air National Guard and hiring officers as defendants in a sex discrimination action brought by a rejected applicant.

may authorize jurisdiction.[9] Article III prescribes the outer limits of federal judicial power; it gives Congress discretion to decide how much of that power the federal courts will actually exercise.[10] And while Congress may afford a narrower scope of jurisdiction than the Constitution,[11] it may not empower the federal judiciary to act beyond the confines of article III.[12]

(2) The Constitution also limits the jurisdiction of the courts to "cases" and "controversies." "The Supreme Court has derived from these two words a substantial body of doctrine

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[8]U.S. Const. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Counsuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction").

[9]Stevenson v. Fain, 195 U.S. 165, 167 (1904); M'Intire v. Wood, 11 U.S. (7 Cranch) 504, 506 (1813); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33 (1812).

[10]Kline v. Burke Constr. Co., 260 U.S. 226 233-34 (1922); Mayor of Nashville v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1867). See infra § 3.3.

[11]Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). For nearly two centuries, jurists and commentators have debated whether constitutionally-prescribed jurisdiction is mandatorily "vested" in the federal courts. In other words, whether the Constitution requires that Congress grant the federal courts the full scope of article III jurisdiction, and whether once granted, Congress can circumscribe the jurisdiction of the courts. See, e.g., United States v. Klein, 80 U.S. (13 Wall.) 128 (1871); Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328-30 (1816) (Story, J.); Clinton, A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan, 86 Colum. L. Rev. 1515 (1986); Clinton, A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. Pa. L. Rev. 741 (1984). The conventional wisdom, and the rule uniformly followed by the federal courts, is that Congress has plenary authority to delimit the jurisdiction of the federal courts. See P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 12-13 n.46, 313-15 (3rd ed. 1988) [hereinafter Hart & Wechsler's Federal Courts]; C. Wright, The Law of Federal Courts 45-46 (5th ed. 1994).

[12]Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

describing the circumstances in which federal courts may or may not exercise their subject matter jurisdiction."[13] The terms, which are referred to as justiciability, embody two separate concepts:

> In part the words limit the business of federal courts to questions presented in an adversary context viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power designed to assure that the federal courts will not intrude into areas committed to the other branches of government.[14]

In its adversarial context, justiciability includes the prohibition against advisory opinions, the proscription against deciding moot cases, and the requirements of ripeness and standing.[15] In its role of assigning judicial power in a tripartite system of government, justiciability encompasses the political question doctrine.[16]

### 3.3 **Congressional Grants of Jurisdiction.**

a. Introduction. As noted above, the federal courts are courts of limited, as opposed to general, jurisdiction. "They are empowered to hear only such cases as are within the judicial power of the United States, as defined in the Constitution, and have been entrusted to them by a jurisdictional grant by Congress."[17] There are many congressional grants of jurisdiction to the federal courts.[18] Some are related to particular types of litigation, such as admiralty, bankruptcy, patents, anti-trust, and civil

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[13]L. Tribe, American Constitutional Law 67 (2d ed. 1988).

[14]Flast v. Cohen, 392 U.S. 83, 94-95 (1968). See infra § 3.4.

[15]See infra § 3.4b.

[16]See infra § 3.4c.

[17]C. Wright, supra note 11, at 27.

[18]See, e.g., 28 U.S.C. §§ 1331-1364.

rights, while others are related to certain remedies codified by Congress such as habeas corpus and mandamus. In most military cases, a plaintiff will have little difficulty in finding a jurisdictional basis for federal court review of his case. Six statutory grants of jurisdiction have supported the bulk of challenges to military decisions and actions: federal question jurisdiction, 28 U.S.C. § 331 (1982); the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491 (1982); the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2761-2780 (1982); mandamus, 28 U.S.C. § 1361 (1982); habeas corpus, 28 U.S.C. § 2241 (1982); and civil rights jurisdiction, 28 U.S.C. § 1343 (1982).

b. Federal Question Jurisdiction.

(1) General. Jurisdiction in most lawsuits against the military is predicated at least in part on the federal question jurisdiction statute, 28 U.S.C. § 1331. The statute provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[19]

[19]Until 1976, the district courts' federal question jurisdiction was available only if the plaintiff could establish that his lawsuit involved an "amount in controversy" exceeding $10,000. Earlier editions of this textbook contained a chapter devoted largely to a discussion of the amount in controversy requirement in military cases. The question was critical in cases involving challenges to the constitutionality of military policies, which arguably could not be valued in dollars and cents and, hence, were not in excess of $10,000. In 1976, Congress eliminated the "amount in controversy" requirement in actions "against the United States, any agency thereof, or any officer or employee thereof in his official capacity." Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721. In 1980, Congress eliminated the $10,000 "amount in controversy" requirement for all cases under § 1331. Federal Question Jurisdictional Amendments of 1980, Pub. L. No. 94-486, 94 Stat. 2369.

Though gone as a prerequisite in lawsuits against the federal government for two decades, the "amount in controversy" requirement holds more than mere historical interest. Some plaintiffs' counsel, apparently unaware of the amendments to § 1331, continue to assert that their lawsuits involve an amount in excess of $10,000. Standing alone this error is harmless. But when these same plaintiffs assert claims under the Tucker Act, which limits district courts to claims under $10,000 (see infra § 3.3c), the "amount in controversy" allegation can be fatal to the district courts' continued cognizance over the lawsuits. But cf. Hahn v. United States, 757 F.2d 581, 586 (3d Cir. 1985) (amount in controversy under § 1331 not necessarily the same as the amount of a Tucker Act claim).

(2) Historical Origins. The Constitution affords the federal judiciary potential original jurisdiction to adjudicate cases arising under federal law.[20] Indeed, the protection of federal rights was a primary purpose for the creation of the federal courts.[21] The First Judiciary Act, however, failed to furnish the federal courts with original jurisdiction to hear cases arising under federal law;[22] instead, "private litigants [had to look] to the state tribunals in the first instance for vindication of federal claims, subject to limited review by the Supreme Court."[23]

With one exception,[24] from 1789 to 1875, Congress "sparingly" granted federal courts original jurisdiction over federal questions, usually only when dictated by peculiar federal concerns or by

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[20]Article III, section 2, clause 1, of the Constitution provides: "The judicial power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ."

[21]Hart & Wechsler's Federal Courts, supra note 11, at 844; C. Wright, supra note 11, at 100.

[22]Judiciary Act of 1789, 1 Stat. 73.

[23]Hart & Wechsler's Federal Courts, supra note 11, at 844. Some commentators suggest that the First Judiciary Act constituted a compromise measure between Federalist and anti-Federalist members of Congress. Federalists sacrificed original jurisdiction over federal questions in favor of federal diversity jurisdiction. Apparently, the Federalists were principally concerned with the potential for state court discrimination against nonresidents, which necessarily would undermine commercial intercourse between states. By contrast, federal questions were more likely to be issues of law and more easily corrected by the appellate review of the Supreme Court. Chadbourn & Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639, 641-42 (1942); Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 78-81 (1923). See generally Clinton, supra note 11, at 1541-43 (1986).

[24]In the closing days of the Adams Administration, the outgoing Congress enacted the so-called Law of Midnight Judges (Act of Feb. 13, 1801, § 11, 2 Stat. 89), which, among other things, vested the federal courts with original jurisdiction over federal questions. The Act, however, served as a means by which the Federalist party, beaten at the polls, could seek "refuge in the judicial branch." Hart & Wechsler's Federal Courts, supra note 11, at 845. See also id. at 37, quoting Frankfurter & Landis, The Business of the Supreme Court 25 (1928) (the Act "combined thoughtful concern for the federal judiciary with selfish concern for the Federalist party"). Congress repealed the Act a little more than a year later. Act of March 8, 1802, 2 Stat. 132.

political exigencies.[25] In 1875, influenced by the wave of nationalism produced by the Civil War,[26] Congress at last gave the federal courts original jurisdiction "of all suits of a civil nature, at common law or in equity . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority. . . ."[27]

(3) The Meaning of "Arising Under" Federal Law.

(a) Introduction. The key phrase in § 1331, and the one critical to determining the scope of the original federal question jurisdiction of the federal courts, is "arising under."[28] Unfortunately, the Supreme Court, in construing the phrase, has issued unclear and sometimes inconsistent pronouncements, making the definition of "arising under" a "puzzle to judge and scholar alike."[29] To complicate matters further, the statutory interpretation of "arising under" has been more circumscribed than the construction given to the terms under the Constitution, even though the statutory and constitutional provisions are virtually identical.[30] If there is one consolation to the military litigator, it

[25]Hart & Wechsler's Federal Courts, supra note 11, at 845. For example, early congresses afforded federal courts jurisdiction over federal criminal cases, patent suits, and certain state court litigation involving federal officers. Id.

[26]Chadbourn & Levin, supra note 23, at 644-45; Hart & Wechsler's Federal Courts, supra note 11, at 846-47.

[27]Act of March 3, 1875, 18 Stat. 470.

[28]See, e.g., Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting); C. Wright, supra note 11, at 101.

[29]Cohen, The Broken Compass: The Requirement that a Case Arise "Directly" under Federal Law, 115 U. Pa. L. Rev. 890 (1967) (footnotes omitted). See also Chadbourn & Levin, supra note 23, at 671.

[30]See infra notes 44-55 and accompanying text.

is that cases against the United States armed forces nearly always arise under federal law. Difficulties in the construction of the statute usually encompass cases involving both federal and state law.[31]

(b) Constitutional Meaning of "Arising Under." "Though the phrase 'arising under' is hardly self-explanatory, the framers of the Constitution provided little clarification of its meaning. . . ."[32] James Madison, the originator of the phrase, cryptically described the reach of "arising under" jurisdiction as including cases that arise under the Constitution and, "[w]ith respect to the laws of the Union, it is . . . necessary and expedient that the judicial power should correspond to the legislative . . . ."[33] At least one authority has suggested that those favoring adoption of the new Constitution intended ambiguity to head off opposition to federal judicial power:

> Ambiguity is nearly synonymous with breadth, particularly if the construers are friendly. Perhaps Madison and his associates preferred ambiguity. Surely they were capable of drafting a precise definition. But a precise definition might have led to opposition which might have limited the scope of federal judicial power. Thus, an ambiguity--satisfactory as a compromise to an uncertain opposition--may have been chosen intentionally with the anticipation that it would be resolved eventually to the advantage of the federal government in a system in which the federal courts would have the last words on such questions.[34]

When given the opportunity to construe the constitutional reach of the original jurisdiction of the federal courts under the "arising under" clause,[35] the Supreme Court defined it broadly. The leading

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[31]See Note, The Outer Limits of "Arising Under", 54 N.Y.U.L. Rev. 978, 981-82 (1979) [hereinafter Note, The Outer Limits of "Arising Under"].

[32]Martin H. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 54 (1980).

[33]Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 532 (2d ed. 1836), quoted in Forrester, The Nature of a "Federal Question", 16 Tul. L. Rev. 362, 366 (1942).

[34]Forrester, supra note 33, at 367.

[35]In Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), the Supreme Court construed the scope of its appellate jurisdiction under the "arising under" clause of article III. Holding that the clause gave it

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case interpreting the scope of the constitutional provision is Osborn v. Bank of the United States.[36] In Osborn, the Bank of the United States sued the Auditor of Ohio (Osborn) to enjoin the enforcement of a tax imposed by the state against the bank. The federal statute creating the bank empowered it to sue, but Osborn challenged the constitutional authority of Congress to give the federal courts jurisdiction of all suits brought by the bank since some of the cases might not arise under the Constitution. Writing for the majority, Chief Justice Marshall found that the bank statute gave the federal courts jurisdiction over all suits to which the bank was a party and that this jurisdictional grant was consistent with article III. Marshall stated:

> We think . . . that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of the Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.[37]

In Osborn, the bank's claim was based on federal supremacy and arose under federal law even using a conservative construction of the "arising under" clause. To illustrate the broad reach of the clause, however, Marshall offered a hypothetical case, actually presented in the companion decision of Bank of the United States v. Planters' Bank,[38] of the bank suing on a contract. Although the contract claim itself would be dependent upon state law, Marshall found that the first question presented in the case (and every case involving the bank) is the right of the bank to sue--a question of federal law. And regardless of whether this underlying question is definitively settled by the Court, the question is still an

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jurisdiction to review state court judgments in criminal cases, id. at 392-94, the Court gave the clause the following construction: "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or law of the United States, whenever its correct decision depends upon the construction of either." Id. at 379.

[36]22 U.S. (9 Wheat.) 738 (1824).

[37]Id. at 823.

[38]22 U.S. (9 Wheat.) 904 (1824).

ingredient of every cause involving the bank. Once this federal ingredient is recognized, the lawsuit arises under federal law even though all other issues may be predicated on state law:

> When the Bank sues, the first question which presents itself, and which lies at the foundation of the case is, has this legal entity a right to sue? Has it a right to come, not into this Court particularly, but into any Court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions and they exist in every possible case. The right to sue, if decided once, is decided for ever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.[39]

Under Marshall's construction of "arising under," the Constitution permits federal courts to take cognizance of cases if the mere possibility exists that they may contain an issue of federal law, even though in actuality their outcome will be governed solely by state law.[40]

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[39]Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) at 823-24.

[40]See Chadbourn & Levin, supra note 23, at 648-49; Forrester, supra note 33, at 370-71; M. Redish, supra note 32, at 55-56; Shapiro, Jurisdiction and Discretion, 60 N.Y.U.L. Rev. 543, 567 (1980); Note, The Outer Limits of "Arising Under", supra note 31 at 987-88.

Earlier in his opinion, Marshall used more restrictive language in defining the scope of "arising under" jurisdiction, which was adopted by federal courts construing the reach of the federal question jurisdiction statute.[41] Marshall stated:

> If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all other questions must be decided as incidental to this, which gives that jurisdiction.[42]

In dissent, Justice Johnson believed the permissible scope of federal question jurisdiction to be much more circumscribed. Unless a suit actually presented for adjudication a federal question, Johnson felt that the federal courts lacked constitutional competence to consider the case: "[U]ntil a question involving the construction or administration of the laws of the United States did actually arise, the casus federis was not presented, on which the constitution authorized the government to take to itself the jurisdiction of the cause."[43]

(c) The Statutory Meaning of "Arising Under." By the Judiciary Act of 1875, Congress gave the federal courts original jurisdiction to hear cases "arising under" federal law.[44] Although sparse, the act's legislative history and contemporary commentary all assumed that Congress

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[41]C. Wright, supra note 11, at 102.

[42]Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 822 (1824).

[43]Id. at 885. Under Justice Johnson's construction, a case does not arise under federal law until an actual controversy over a federal issue exists. Thus, no case could be brought initially in the federal courts under the "arising under" clause since no case would present a federal question until a dispute over federal law was actually joined. That the plaintiff might plead matters of federal law would be of no moment since the defendant might never dispute them. Chadbourn & Levin, supra note 23, at 648; Cohen, supra note 29 at 892.

[44]Act of March 3, 1875, § 1, 18 Stat. 470.

conferred upon the federal judiciary a federal question jurisdiction as broad as the Constitution allowed.[45] Moreover, the wording of the statute is almost identical to its constitutional counterpart in article III.[46] With few exceptions,[47] however, the Supreme Court has construed the federal question jurisdiction statute more narrowly than it did the constitutional provision in Osborn.[48] Although in early decisions it paid lip service to Osborn,[49] the Court has taken a more restrictive view of when a case "arises under" federal law.

Modern scholars generally defend the Supreme Court's limited interpretation of the federal question statute (although few find merit in the particular formulations of "arising under" enunciated by the Court).[50] Most recognize that unflinching embracement of the Osborn rule in determining the scope

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[45]Chadbourn & Levin, supra note 23, at 649-50; Forrester, supra note 33, at 374-77.

[46]The only significant difference between the 1875 statute and article III was that the statute used the word "suits" and article III used the word "cases." Only one Supreme Court justice has found the distinction a critical one. New Orleans M. & T. R.R. v. State of Mississippi, 102 U.S. 135, 143-44 (1880) (Miller, J., dissenting). See Hart & Wechsler's Federal Courts, supra note 11, at 870 n.1.

[47]See Pacific Railroad Removal Cases, 115 U.S. 1 (1885).

[48]Chadbourn & Levin, supra note 23, at 650; Cohen, supra note 29, at 891; Forrester, supra note 33, at 377; Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 160 (1953); Shapiro, supra note 40, at 568; C. Wright, supra note 11, at 103. Nor has the Court adopted Justice Johnson's opinion in Osborn. Cohen, supra note 29, at 892. But see Shulthis v. McDougal, 225 U.S. 561, 569 (1912) ("A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such law, upon the determination of which the result depends") (emphasis added).

[49]See, e.g., State of Tennessee v. Union & Planters' Bank, 152 U.S. 454, 459 (1894); Starin v. New York, 115 U.S. 248, 257 (1885); Little York Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 201 (1877); Chadbourn & Levin, supra note 23, at 651-56, 62; C. Wright, supra note 11, at 102.

[50]See, e.g., Cohen, supra note 29, at 891; Forrester, supra note 33, at 385; Mishkin, supra note 48 at 162-63; M. Redish, supra note 32, at 64. But cf. Note, The Outer Limits of "Arising Under", supra note 31, at 989-90.

of federal question jurisdiction could flood the federal courts with cases totally unrelated to federal law.[51] At the same time, these commentators justify the need for a broad construction of the constitutional provision to give Congress leeway to meet unanticipated problems it may encounter in the future.[52] In the last several years, the Supreme Court has explicitly recognized that the scope of the federal question jurisdiction statute is considerably more circumscribed than its constitutional antecedent.[53]

When does a case "arise under" federal law for the purpose of § 1331 jurisdiction? As a general rule, "an action arises under federal law . . . if in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law--whether that proposition is independently applicable or becomes so only by reference from state law.'[54] Under this formulation of federal question jurisdiction, a case will "arise under" federal law under one of two circumstances: (1) when federal law creates the cause of action on which the plaintiff

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[51]Cohen, supra note 29, at 891; Mishkin, supra note 48, at 162-63.

[52]M. Redish, supra note 32, at 64.

[53]See Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986) ("Although the constitutional meaning of 'arising under' may extend to all cases in which a federal question is 'an ingredient' of the cause of action . . . we have long construed the statutory grant of federal-question jurisdiction as conferring more limited power"); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 n.8 (1983) ("[W]e have only recently reaffirmed what has long been recognized--that 'Art. III "arising under" jurisdiction is broader than federal-question jurisdiction under § 1331' "); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 495 (1983) ("[T]he many limitations placed on jurisdiction under § 1331 are not limitations on the constitutional power of Congress to confer jurisdiction on the federal courts"); Romero v. International Terminal Operating Co., 358 U.S. 354, 379 (1959) ("The Act of 1875 is broadly phrased, but it has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation. It is a statute, not a Constitution, we are expounding").

[54]Hart & Wechsler's Federal Courts, supra note 11, at 889, quoted in Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 (1983).

is suing, and (2) where the vindication of a right under state law necessarily turns on some construction of federal law.[55]

i. Federal Causes of Action. "[T]he vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action."[56] The most famous expression of this test for federal question jurisdiction is Justice Holmes' opinion in American Well Works Co. v. Layne & Bowler Co.: "A suit arises under the law that creates the cause of action."[57] Although Holmes intended the rule to be one of exclusion (non-federal causes of action do not arise under federal law), courts now recognize Holmes' formula to be a useful test for which cases are to be included under § 1331.[58]

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[55]See Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986); Seinfield v. Austen, 39 F.3d 761 (7th Cir. 1994); cert. denied, 115 S. Ct. 1998 (1995); Virgin Islands Housing Authority v. Coastal General Construction Services Corporation, 27 F.3d 911 (3d Cir. 1994).

[56]Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986).

[57]241 U.S. 257, 260 (1916).

[58]T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964) (Friendly, J.). See also Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 (1983). Not all causes of action created by federal law, however, necessarily fall within federal question jurisdiction. For example, in Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900), Congress established a scheme by which miners holding federal patents could settle adverse claims over their mines. The statute authorized the miners to sue in any court of competent jurisdiction, and that the right of possession would be determined by "local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. . . ." Id. at 508. Even though the federal statute gave the miners the right to sue, the Court held that a miner's suit to adjudicate an adverse claim did not "arise under" federal law for the purpose of the federal question jurisdiction statute. The Court held that the resolution of the claims would normally turn on questions of state law:

> Inasmuch . . . as the "adverse suit" to determine the right of possession may not involve any question as to the construction or effect of the Constitution or laws of the United States, but may present simply a question of fact as to the time of discovery of mineral, the location of the claim on the ground, or a determination of the meaning and effect of certain local rules and customs prescribed by the miners of the district, or the effect of

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To arise under federal law for purposes of the federal question jurisdiction statute, a plaintiff need not have a valid federal cause of action. Provided the plaintiff's federal claim is neither frivolous nor clearly untenable, it "arises under" federal law.[59] In other words, a defendant's challenge to the merits of a plaintiff's federal claim does not go to the jurisdiction of the court to hear the claim.

To support federal question jurisdiction, the plaintiff may not rely on an anticipated federal defense if the claim is otherwise predicated on state law. The courts will not permit a plaintiff to artfully convert a state claim into a federal one merely by pleading federal issues likely to be raised by the defendant.[60]

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(..continued)

> state statutes, it would seem to follow that it is not one which necessarily arises under the Constitution or the laws of the United States.

Id. at 509. Compare Feibelman v. Packard, 109 U.S. 421 (1883) (suit on U.S. marshall's bond arises under federal law). See Cohen, supra note 29, at 902-03; M. Redish, supra note 32, at 69. Conversely, even where a plaintiff attempts to assert a claim wholly based on state law, if federal law preempts the particular field, the plaintiff's claim arises under federal law. See, e.g., Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987). See also infra notes 95-97 and accompanying text.

[59]Bell v. Hood, 327 U.S. 678 (1946); The Fair v. Kohler Die & Specialty Co., 228 U.S. 22 (1913). But cf. Leonard v. Orr, 590 F. Supp. 474 (S.D. Ohio 1984) (apparently basing dismissal for want of jurisdiction under § 1331 on plaintiff's failure to state a meritorious federal claim). See generally Mishkin, supra note 48, at 166.

[60]Taylor v. Anderson, 234 U.S. 74 (1914); Boston & Montana Consol. Copper & Silver Mining Co. v. Montana Ore Purchasing Co., 188 U.S. 632 (1903). See generally Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10, 13-14 (1983); Gully v. First Nat'l Bank, 299 U.S. 109, 113 (1936); State of Tennessee v. Union and Planters' Bank, 152 U.S. 454, 459 (1894). See also infra notes 81-100 and accompanying text.

Most litigation involving the military is likely to be predicated on a federally-created cause of action. Common examples include lawsuits seeking review of agency actions under the Administrative Procedure Act[61] and constitutional tort suits against individual federal officers.[62]

ii. State Cause of Action Necessarily Turning on Construction of Federal Law. The second circumstance under which a case will "arise under" federal law is when a cause of action, although created by state law, necessarily turns on the construction of a substantial federal question.[63] This formulation of federal question jurisdiction is problematic. No clear standard exists by which courts can determine "the degree to which federal law must be in the forefront of the case and not collateral, peripheral or remote."[64]

The key case is Smith v. Kansas City Title & Trust Co..[65] In Smith, a shareholder in the defendant corporation sued in federal court to enjoin the defendant from investing funds in bonds issued

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[61]5 U.S.C. §§ 701-06 (1982).

[62]See Bivens v. Six Unknown Agents, 403 U.S. 388 (1971). See generally infra chapter 9. Regardless of the state or federal character of a plaintiff's action, where federal officials are named as parties, they have a statutory right to remove the case to federal court. 28 U.S.C. §§ 1442, 1442a (1982). See, e.g., Privette v. Dep't of Air Force, unpublished opinion, 1995 WL 294460 (Fed. Cir. May 15, 1995) (affirming the decision to remove an Air Force civilian police officer on appeal from the Merit Systems Protection Board).

[63]See Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9, 13 (1983); see also Platzer v. Sloan-Kettering Institute for Cancer Research, 787 F. Supp. 360 (S.D.N.Y. 1992), aff'd, 983 F.2d 1086 (Fed. Cir.), cert. denied, 507 U.S. 1006 (1993).

[64]Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting); Seinfeld v. Austen, 39 F.3d 761 (7th Cir. 1994), cert. denied, 115 S. Ct. 1998 (1995). This particular test for federal question jurisdiction has also received most of the commentators' attention. See, e.g., 13B C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure 17-48 (1984) [hereinafter Wright, Miller & Cooper]; Note, The Outer Limits of "Arising Under", supra note 31.

[65]255 U.S. 180 (1921)

under the Federal Farm Loan Act. The plaintiff claimed that the bonds were issued in violation of the United States Constitution and, therefore, the investment was illegal under state law. Although the plaintiff's cause of action was grounded in state law (and under Holmes' formulation did not "arise under" federal law),[66] the Court held that the claim fell within the federal question jurisdiction of the district court. Finding that the plaintiff's claim turned entirely on a federal constitutional question, the Court reasoned that the case arose under federal law:

> In the instant case the averments of the bill show that the directors were proceeding to make the investments in view of the act authorizing the bonds about to be purchased, maintaining that the act authorizing them was constitutional and the bonds valid and desirable investments. The objecting shareholder avers in the bill that the securities were issued under an unconstitutional law, and hence of no validity. It is, therefore, apparent that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue.[67]

The extent to which federal law must play a role in the state action is unclear, and the Supreme Court's decisions have not been entirely consistent.[68] Further, the Court, while reaffirming the Kansas

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[66]Id. at 213-15 (Holmes, J., dissenting).

[67]Id. at 201. See also Flournoy v. Wiener, 321 U.S. 253, 270-72 (1944); Standard Oil Co. v. Johnson, 316 U.S. 481, 483 (1942) (appellate jurisdiction of Supreme Court). Compare Miller's Ex'rs v. Swann, 150 U.S. 132 (1893).

[68]Compare Moore v. Chesapeake & Ohio Ry. Co., 291 U.S. 205 (1934), with Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921). See M. Redish, supra note 32, at 67. But cf. Cohen, supra note 29, at 912; Note, The Outer Limits of "Arising Under", supra note 31, at 1003-04 n.161. One oft-cited statement about the requisite degree of federal law a complaint must contain to support federal question jurisdiction appears in Gully v. First National Bank, 299 U.S. 109, 112 (1936): "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." See also Note, The Outer Limits of "Arising Under", supra note 31, at 1004 (advocating the following standard: "a lawsuit arises under federal law if, at the time the federal judicial power is invoked, the claim for relief substantially relies on a proposition of federal law"). Some commentators have argued for a pragmatic approach, based upon the nature of the federal interest at stake, to determine whether a claim "arises under" federal law. See, e.g., Cohen, supra note 29, at 916.

City Title formulation for federal question jurisdiction,[69] has significantly curtailed its reach. In Franchise Tax Board v. Construction Laborers Vacation Trust,[70] the tax enforcement agency of California brought a state court suit against a trust created under the Employment Retirement Income Security Act of 1974 (ERISA) for income taxes owed by beneficiaries of the trust. The defendant removed the case to the federal district court. The key issue in the case, and one pleaded by the plaintiff in its complaint, was whether ERISA preempted state law and barred enforcement of the tax levy. The Court implied that the claim was not completely preempted by ERISA thereby removing it from within the federal court's original jurisdiction.[71] The Court held expressly that the ERISA issue was one of defense and that the plaintiff's claim did not "necessarily depend on resolution" of the question.[72]

In Merrell Dow Pharmaceuticals, Inc. v. Thompson,[73] the plaintiffs sued in Ohio state court the manufacturers and distributors of the drug Bendectin, claiming it caused birth defects. In part, the plaintiffs alleged that the drug was "misbranded" under the Federal Food, Drug, and Cosmetics Act (FDCA)[74] because its labeling did not adequately warn of its potential dangers. This misbranding, the plaintiffs contended, constituted a rebuttable presumption of negligence under state law. The defendants removed the case to federal court, asserting that the plaintiffs' claim turned on the question of whether Bendectin was mislabelled under federal law.[75]

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[69]See generally Wright, Miller & Cooper, supra note 64, at 41-44.

[70]463 U.S. 1 (1983).

[71]Id. at 21-22; see also Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) (Congress can completely pre-empt an area such that state law claims within it are always converted to federal claims).

[72]Id. at 28.

[73]478 U.S. 804 (1986).

[74]21 U.S.C. §§ 301-392 (1982).

[75]Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986).

A narrowly-divided Supreme Court found that a complaint alleging the violation of a federal statute as an element of a state cause of action does not "arise under" federal law unless Congress has determined that the plaintiff could bring a "private, federal cause of action for the violation" of the statute.[76] Finding that the FDCA did not create a privately-enforceable federal cause of action,[77] the Court concluded that the plaintiffs' complaint could not support federal question jurisdiction.[78]

The Kansas City Title formulation of federal question jurisdiction is likely to arise in military litigation when the armed forces have only a tangential interest in the case, usually as a mere stakeholder. For example, in Smith v. Grimm,[79] the plaintiff, an attorney (Smith), had successfully represented the defendant (Grimm) in a back pay claim against the Air Force. Smith's attorneys fee was contingent upon success in the back pay claim; Smith was to get 50% of any recovery. When Grimm refused to pay Smith, Smith sued Grimm and the Air Force in federal district court, seeking an equitable lien on Grimm's Air Force pay. The Court of Appeals for the Ninth Circuit ruled that the district court lacked jurisdiction to hear Smith's claim under § 1331, because the claim "arose under" state, not federal, law. In essence, Smith had a state-law contract claim against Grimm, and his right to an equitable lien arising out of the contract action was similarly predicated on state law. The Air Force's only role was as Grimm's former employer and present debtor.[80]

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[76]Id. at 817.

[77]Id. at 812. See Canon v. University of Chicago, 441 U.S. 677 (1979); Cort v. Ash, 422 U.S. 66 (1975).

[78]An analogous issue decided by the Supreme Court precludes parents subject to conflicting state child-custody decrees from asking the federal courts to determine which state decree is valid and enforceable under the Parental Kidnapping Prevention Act of 1980. 28 U.S.C. § 1738A (1982). Instead the parents must use state appellate review. Thompson v. Thompson, 484 U.S. 174 (1988).

[79]534 F.2d 1346 (9th Cir.), cert. denied, 429 U.S. 980 (1976).

[80]Id. at 1350-51. See also Morrison v. Morrison, 408 F. Supp. 315 (N.D. Tex. 1976) (action seeking garnishment of military retired pay arises under state, not federal, law).

(4) The "Well-Pleaded Complaint" Rule. As a general principle, courts determine their jurisdiction at the time lawsuits are filed. Drawing on this principle, the Supreme Court has firmly established the rule that whether plaintiffs' claims "arise under" federal law must be ascertained from the well-pleaded allegations of their complaints. And as a corollary to the rule, the federal question cannot be based on some anticipated defense likely to be raised by the defendant:

> [W]hether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of that jurisdictional statute . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.[81]

A famous application of the rule is Louisville and Nashville Railroad Co. v. Mottley.[82] In 1871, the Mottleys received lifetime passes on the defendant railroad in consideration for their release of claims against the railroad for injuries they had suffered as the result of a train collision. In 1907, the railroad refused to renew their passes, relying on a 1906 federal statute forbidding railroads from issuing free passes or free transportation. The Mottleys sued the railroad in federal court, alleging that it had breached their agreement, and that the federal statute on which the railroad relied in refusing to renew the passes was both inapplicable and unconstitutional.

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[81]Taylor v. Anderson, 234 U.S. 74, 75-76 (1914). See also Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, (1986); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10 (1983); Gully v.First Nat'l Bank, 299 U.S. 109, 113 (1936); Boston & Montana Consol. Cooper & Silver Mining Co. v. Montana Ore Purchasing Co., 188 U.S. 632, 640 (1903); State of Tennessee v. Union & Planters' Bank, 152 U.S. 454, 464 (1894); Metcalf v. State of Watertown, 128 U.S. 586, 589 (1888). See generally Doernberg, There's No Reason for It; It's Just Our Policy: Why the Well- Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction, 38 Hastings L.J. 597 (1987) (traces development of "well-pleaded complaint" rule).

[82]211 U.S. 149 (1908).

Even though the only probable issue to be decided in the case was the federal question -- whether the statute was applicable and constitutional--the Court held that the Mottleys had failed to state a claim under federal law. Instead, their cause of action was simply a state-based contract claim, and the federal question was simply a matter of anticipated defense:

> It is settled interpretation of ["arising under"], as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and law of the United States only when a plaintiff's statement of his own cause of action shows that it is based upon those laws or the Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision to the Constitution of the United States. Although such allegations show very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution.[83]

The "well-pleaded complaint" rule is strictly construed. It prevents plaintiffs from asserting extraneous factual or legal matters in their complaints to create a federal question. In other words, it limits plaintiffs to the bare allegations necessary to state a cause of action.[84] Moreover, by focusing on the four-corners of the plaintiff's complaint, the rule applies equally to the removal jurisdiction of the federal courts.[85]

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[83]Id. at 152. The Mottleys later sued the railroad in the state courts. When the case reached the Supreme Court on appeal, the Court ruled in favor of the defendant on the federal issues. Louisville & Nashville R.R. Co. v. Mottley, 219 U.S. 467 (1911).

[84]Taylor v. Anderson, 234 U.S. 74 (1914); Joy v. St. Louis, 201 U.S. 332 (1906); Elf Aquitaine, Inc. v. Placid Oil Co., 624 F. Supp. 994 (D. Del. 1985). See also Mishkin, supra note 48, at 164; Wright, Miller & Cooper, supra note 64, at 87-90 ("[A] plaintiff cannot win admission to federal court by allegations to support his own case that are not required by nice pleading rules").

[85]Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10 n.9 (1983). The American Law Institute [ALI] has recommended that removal jurisdiction be available when "'a substantial defense arising under the Constitution, laws, or treaties of the United States is properly asserted that, if sustained, would be dispositive of the action.'" ALI, Study of the Division of Jurisdiction Between State and Federal Courts 25-26 (1969) [hereinafter ALI Study], quoted in M. Redish, supra note 32, at 73 n.135. Congress has not adopted the proposal. Franchise Tax Bd. v. Construction

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The "well-pleaded complaint" rule has also limited the scope of actions available under the Declaratory Judgment Act.[86] Declaratory judgment actions have traditionally served as a means by which prospective defendants can use their defenses as swords. Rather than waiting for the other party to sue, the prospective defendant can seek a judicial adjudication of the rights of the parties based on the question he would have raised as a defense had he waited to be sued.

Thus, a classic declaratory judgment action is in many respects a mirror image of an eventual suit: the plaintiff in the declaratory judgment action is the party whose conduct is likely to be ultimately challenged. In other words, he would be, absent use of the declaratory judgment device, the eventual defendant. Instead, he seeks a judicial declaration that the activity he has performed or will undertake is proper. In such a situation, the plaintiff's complaint must anticipate the eventual defense, or it would be effectively saying nothing.[87]

Under the "well-pleaded complaint" rule, however, the focus is on "whether federal substantive law forms an essential element of the cause of action itself, as distinguished from possible defenses thereto, respecting which federal jurisdiction is invoked."[88] The Declaratory Judgment Act, which is procedural only and cannot enlarge the jurisdiction of the federal courts,[89] does not change the "well-

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Laborers Vacation Trust, 463 U.S. at 11 n.9. See also International Primate Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72 (1991).

[86]28 U.S.C. §§ 2201-02 (1982).

[87]M. Redish, supra note 32, at 75 (emphasis in the original).

[88]Lowe v. Ingalls Shipbuilding, 723 F.2d 1173, 1179 (5th Cir. 1984). See also Platzer v. Sloan-Kettering Institute for Cancer Research, 787 F. Supp. 360 (S.D.N.Y. 1992), aff'd, 983 F.2d 1086 (Fed. Cir.), cert. denied, 507 U.S. 1006 (1993).

[89]Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937).

pleaded complaint" rule. Consequently, the act does not confer jurisdiction to decide issues of federal law that would (without the Act) only be pleaded defensively in the conventional lawsuit.[90]

In Skelly Oil Co. v. Phillips Petroleum Co.,[91] Skelly Oil and Phillips contracted for the sale of natural gas. The contract entitled Skelly, the seller, to terminate the contract any time after December 1, 1946, if the Federal Power Commission did not issue a certificate of convenience and necessity to a pipeline company to which Phillips intended to resell the gas. While the Federal Power Commission told the pipeline company on November 30, 1946, that it would issue a conditional certificate, it did not make its order public until December 2. Skelly Oil notified Phillips that it had terminated the contract. Phillips sued Skelly, seeking a declaratory judgment that the contract was still in effect. The Supreme Court held, however, that Phillip's suit did not "arise under" federal law:

> "[T]he operation of the Declaratory Judgment Act is procedural only." . . . Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction. When concerned as we are with the power of the inferior federal courts to entertain litigation within the restricted area to which the Constitution and Acts of Congress confine them, "jurisdiction" means the kinds of issues which give right of entrance in the federal courts. Jurisdiction in this sense was not altered by the Declaratory Judgment Act. Prior to that Act, a federal court would entertain a suit on a contract only if the plaintiff asked for an immediately enforceable remedy like money damages or an injunction, but such relief could only be given if the requisites of jurisdiction, in the sense of a federal right or diversity, provided foundation for resort to the federal courts. The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked. But the requirements of jurisdiction--the limited subject matters which alone Congress had authorized the District Courts to adjudicate--were not impliedly repealed or modified.[92]

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[90]Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 15-16 (1983); Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950).

[91]339 U.S. 667 (1950).

[92]Id. at 671-72. See also Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 14-22 (1983) (California tax enforcement agency's state court declaratory judgment suit to establish that

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Under Skelly Oil, "'if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking.'"[93]

Consequently, in determining whether a declaratory judgment suit "arises under" federal law, courts must look beyond the declaratory judgment allegations. A declaratory judgment suit will support federal question jurisdiction under two circumstances. First, a declaratory judgment action "arises under" federal law if a substantial federal question arises from the declaratory judgment defendant's threatened lawsuit:

> Federal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question.[94]

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ERISA did not bar state from levying on trust for back income taxes of beneficiaries does not fall within the federal question jurisdiction of the district court); Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 248 (1952) (dictum). Compare Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983) (ERISA trust can seek declaratory relief in federal court to enjoin enforcement of state statute that is allegedly preempted by ERISA).

[93]Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 16 (1983), quoting 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure 744-45 (2d ed. 1983). See also Commercial Union Insurance Co. v. Walbrook Insurance Co., 41 F.3d 764 (1st Cir. 1994); S. Jackson and Son v. Coffee, Sugar and Cocoa Exchange Inc., 24 F.3d 427 (2d Cir. 1994). The Court's narrow construction of the Declaratory Judgment Act has been the subject of intense academic criticism. See, e.g., Cohen, supra note 29, at 894-95 n.26, 915-16; Doernberg, supra note 81, at 640-46; Mishkin, supra note 48, at 177-84; M. Redish, supra note 32, at 73-77; Wright, Miller & Cooper, supra note 64, at 89-90. The American Law Institute has recommended abandonment of the strict rule of Skelly; instead, federal question jurisdiction should exist in declaratory judgment actions where the initial pleadings set forth a substantial claim under federal law. ALI Study 170-72, cited in Hart & Wechsler's Federal Courts, supra note 11, at 897.

[94]Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 19 (1983). See also Yoken v. Mafnas, 973 F.2d 803 (9th Cir. 1992); West 14th Street Commercial Corp. v. 5 West 14th Street Owners Corp., 815 F.2d 188, 194 (2d Cir. 1987) cert. denied 484 U.S. 850 (1987); "For instance,

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Second, a declaratory judgment action arises under federal law if the complaint raises a federal question when viewed as a coercive action apart from the defendant's anticipated suit. Under this formulation, courts "identify the substantive theory upon which the plaintiffs could have brought their cause of action to determine whether the federal issue would arise under a 'well-pleaded' complaint.'[95] Thus, if the plaintiff's substantive allegations of federal law support an action for coercive relief (e.g., an injunction), they "arise under" federal law.[96]

Under the "well-pleaded complaint" rule, the plaintiffs are normally masters of their claims: they alone determine whether to assert a claim arising under federal law.[97] One exception to the "well-pleaded complaint" rule is the "artful pleading" doctrine. Under the doctrine, a "plaintiff cannot defeat removal by masking or 'artfully pleading' a federal claim as a state claim.'[98] The "artful pleading" doctrine traditionally is applied to permit removal of claims that, although purportedly arising under state law, involve subject-matters that have been entirely preempted by federal law. "Congress may so

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federal courts have consistently adjudicated suits by alleged patent infringers to declare a patent invalid, on the theory that an infringement suit by the declaratory judgment defendant would raise a federal question over which the federal courts have exclusive jurisdiction." Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. at 19 n.19. See E. Edelmann & Co. v. Triple-A Specialty Co., 88 F.2d 852, 854 (7th Cir. 1937).

[95]West 14th Street Commercial Corp. v. 5 West 14th Street Owners Corp., 815 F.2d 188, 195 (2d Cir. 1987).

[96]Id. at 195-96. See also Shaw v. Delta Air Lines, Inc. 463 U.S. 85, 96 n.14 (1983); Hart & Wechsler's Federal Courts, supra note 11, at 897.

[97]The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913).

[98]Sullivan v. First Affiliated Securities, Inc., 813 F.2d 1368, 1372 (9th Cir. 1987) cert. denied 484 U.S. 850 (1987). See also Doe v. Allied Signal Inc., 985 F.2d 908 (7th Cir. 1993).

completely preempt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character.'[99]

The "well-pleaded complaint" rule is likely to arise only peripherally in litigation involving the armed forces. Most commonly, the rule has precluded federal jurisdiction in lawsuits by retired military personnel seeking federal judicial invalidation of state court decrees awarding their spouses a share of their military retirement pay. The armed services are often named in the suits because they are the subject of a state court garnishment order.[100]

(5) What Constitutes Federal Law? The federal question jurisdiction statute serves as a basis for jurisdiction whenever a case arises under the Constitution, laws, or treaties of the United States. Courts have interpreted the term "laws" to include both federal common law[101] and most

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[99]Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987). See also Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 22-27 (1983); Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968); United Jersey Banks v. Parell, 783 F.2d 360 (3d Cir.), cert. denied, 476 U.S. 1170 (1986); Bailey v. Marsh, 655 F. Supp. 1250 (D. Colo. 1987). See generally Segriti, Vesting the Whole "Arising Under" Power of the District Courts in Federal Preemption Cases, 37 Okla. L. Rev. 539 (1984); Twitchell, Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts, 54 Geo. Wash. L. Rev. 812 (1986). But cf. Catepillar, Inc. v. Williams, 482 U.S. 386 (1987) (if an area of state law has not been completely pre-empted, the defense of preemption is insufficient grounds for removal). The courts have also extended the artful pleading rule to permit removal of putatively state claims precluded by the res judicata effect of a prior federal judgment. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981); Sullivan v. First Affiliated Securities, Inc., 813 F.2d 1368, 1375-76 (9th Cir. 1987); Travelers Indemnity Co. v. Sarkisian, 794 F.2d 754, 759-61 (2d Cir. 1986) cert. denied 479 U.S. 885 (1986).

[100]See, e.g., Williams v. State of Washington, 894 F.2d 321 (9th Cir. 1990); Fern v. Turman, 736 F.2d 1367 (9th Cir. 1984), cert. denied, 469 U.S. 1210 (1985).

[101]Illinois v. City of Milwaukee, 406 U.S. 91, 99-100 (1972); Lesal Interiors Inc. v. Echotree Associates, 47 F.3d 607 (3d Cir. 1995; Grumman Ohio Corp. v. Dole, 776 F.2d 338, 344 (D.C. Cir. 1985).

regulations promulgated under federal statute.[102] Before a treaty can form the basis for federal question jurisdiction, it must provide a private right of action.[103] Whether "customary international law" constitutes federal law for the purpose of jurisdiction under § 1331 is unclear.[104]

(6) Federal Question Jurisdiction and Sovereign Immunity. Finally, even though 28 U.S.C. § 1331 is a jurisdictional basis for most suits against the federal government, it does not waive the sovereign immunity of the United States.[105] A separate statutory waiver of the immunity must be found, or the claim must fall within one of the so-called exceptions to the doctrine.[106] The Administrative Procedure Act [APA], 5 U.S.C. §702, however, is a waiver of the Government's sovereign immunity from claims for nonmonetary relief. When the APA is combined with the federal question jurisdiction statute, a jurisdictional basis for equitable relief against the United States usually exists.[107]

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[102]Chasse v. Chasen, 595 F.2d 59 (1st Cir. 1979). See also Wellife Products v. Shalala, 52 F.3d 357 (2d Cir. 1995); Katz v. Cisneros, 16 F.3d 1204 (Fed. Cir. 1994); Wright, Miller & Cooper, supra note 64, at 51.

[103]Princz. v. Federal Republic of Germany, 26 F.3d 1166 (D.C.Cir. 1994), cert, denied, 115 S. Ct. 923 (1995); Goldstar (Panama) S.A. v. United States, 967 F.2d 965 (4th Cir. 1992), cert. denied, 506 U.S. 955 (1992);Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985); Hyosung (America), Inc. v. Japan Air Lines Co., 624 F. Supp. 727, 730 (S.D.N.Y. 1985); Handel v. Artukovic, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985).

[104]Compare Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 923 (1995); Handel v. Artukovic, 601 F. Supp. 1421, 1426-28 (C.D. Cal. 1985), with Wright, Miller & Cooper, supra note 64, at 62-63.

[105]See, e.g., Charles v. Rice, 28 F.3d 1312 (1st Cir. 1994); Whittle v. United States, 7 F.3d 1259 (6th Cir. 1993); Sibley v. Ball, 924 F.2d 25 (1st Cir. 1991); aff'd, 944 F.2d 913 (Fed. Cir. 1991); Gochnour v. Marsh, 754 F.2d 1137 (5th Cir.), cert. denied, 471 U.S. 1057 (1985).

[106]See generally Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689-90 (1949).

[107]Guerrero v. Stone, 970 F.2d 626 (9th Cir. 1992); Beller v. Middendorf, 632 F.2d 788, 796-97 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981); Jaffee v. United States, 592 F.2d 712, 718-19 (3d

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c. The Tucker Act.

(1) General. The Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491, is a jurisdictional basis for nontort monetary claims against the United States based on a contract, or upon a constitutional, statutory, or regulatory provision that grants a plaintiff a right to monetary relief. 28 U.S.C. § 1346(a)(2) which affords the district courts limited jurisdiction to award nontort money damages against the United States, provides in relevant part:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
> . . . .
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

Claims for nontort money damages in excess of $10,000 must be brought in the claims court. 28 U.S.C. § 1491 is the jurisdictional statute for the United States Court of Federal Claims. It states:

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Cir.), cert. denied, 441 U.S. 961 (1979); Helton v. United States, 532 F. Supp. 813, 822 (S.D. Ga. 1982). But see Ward v. Brown, 22 F.3d 516 (2d Cir. 1994).

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration of office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgments upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

(2) Historical Origins. Before 1855, the doctrine of sovereign immunity barred judicial resolution of money claims against the United States.[108] While Congress from time-to-time entrusted the factual adjudication of such claims to various executive officials and specially-created commissions,[109] Congress reserved the decision whether to pay claims against the government.[110]

[108]W. Cowen, P. Nichols & M. Bennett, The United States Court of Claims--A History (Part II: Origins, Development & Jurisdiction; 1855-1976) 1-13 (1978) [hereinafter The United States Court of Claims--A History]; Hart & Wechsler's Federal Courts, supra note 11, at 98; Richardson, History, Jurisdiction, and Practice of the Court of Claims of the United States, 17 Ct. Cl. 3 (1882).

[109]Under the Articles of Confederation, Congress retained the power to adjudicate claims against the central government. The United States Court of Claims--A History, supra note 108, at 2-4. After the

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Indeed, the most common form of recourse available to claimants was from Congress through private relief bills.[111]

Congressional adjudication of claims proved unsuccessful. The system put tremendous burdens on Congress, and was inequitable, slow, and cumbersome.[112] To rectify these problems, in 1855, Congress passed the Court of Claims Act, establishing the Court of Claims.[113] The Act empowered the court to hear money claims against the United States and to make findings on the claims; however, the

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adoption of the Constitution, Congress empowered the Treasury Department to hear claims, although Congress retained final approval responsibility. Act of Sept. 2, 1789, ch. 12, §5, 1 Stat. 66; The United States Court of Claims--A History, supra note 108, at 7-8, 11-13. Congress assigned to the federal circuit courts the authority to resolve disability claims brought by Revolutionary War soldiers, subject to the approval of the Secretary of War and Congress. Act of March 23, 1792, 1 Stat. 242. Most of the circuit courts (which, at the time, were comprised of two Supreme Court justices and a district judge) refused to consider the claims. They reasoned that, without the ability to render final judgments, their adjudications amounted to advisory opinions proscribed by the "case or controversy" requirement of article III. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

[110]Congress was reluctant to delegate completely its power to approve claims because it believed that such a delegation was unconstitutional under article I, section 9, which provides: "No money shall be drawn from the Treasury, but in consequence of appropriations made by law." The United States Court of Claims--A History, supra note 108, at 5. Congress took a more liberal view of article I, section 9 in the 1850's. Id. at 6.

[111]Id. at 8. See also Hart & Wechsler's Federal Courts, supra note 11, at 98; Richardson, supra note 108, at 3; United States v. Mitchell, 463 U.S. 206, 212 (1983). Congressional consideration of claims against the government is based on the first amendment's guarantee of the right of the people to petition the Government for the redress of grievances. The United States Court of Claims--A History, supra note 108, at 4; Richardson, supra note 108, at 3. Both the House and Senate had special standing committees to hear claims against the United States. The United States Court of Claims--A History, supra note 108, at 8.

[112]For a description of the problems, see id. at 8-11, 12-13; Richardson, supra note 108, at 4.

[113]Act of Feb. 24, 1855, ch. 122, 10 Stat. 612.

Act required congressional ratification of all favorable adjudications through private bills.[114] "Since the Congressional committees were willing to re-examine claims de novo and to receive fresh evidence on either side, this procedure succeeded only in erecting an additional hurdle for proper claimants to surmount."[115]

In 1861, President Lincoln urged Congress to permit the Court of Claims to render final judgments.[116] In March, 1863, influenced by Lincoln's recommendation to reform the court's jurisdiction, and spurred by the pressure of Civil War claims, Congress enlarged the court and authorized it to render final judgments subject to appellate review by the Supreme Court.[117] The new statute provided, however, that no money could be paid out of the Treasury on any claim adjudicated by the court until "after an appropriation therefor shall be estimated by the Secretary of the Treasury."[118] This provision proved to be a stumbling block to Supreme Court review because decisions rendered under the statute were subject to revision by the executive branch and, consequently, were potentially advisory in character.[119] Congress eliminated the offensive provision in 1866, opening the door to Supreme Court review of the final judgments of the Court of Claims.[120]

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[114]The United States Court of Claims--A History, supra note 108, at 17-18; Richardson, supra note 108, at 8; 14 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure 213 (1976) [hereinafter 14 Wright, Miller & Cooper].

[115]Hart & Wechsler's Federal Courts, supra note 11, at 99. See also The United States Court of Claims--A History, supra note 108, at 18; Richardson, supra note 108, at 8-9.

[116]The United States Court of Claims--A History, supra note 108, at 20-21.

[117]Act of March 3, 1863, ch. 93, 12 Stat. 765. See The United States Court of Claims--A History, supra note 108, at 21; Hart & Wechsler's Federal Courts, supra note 11, at 99.

[118]Act of March 3, 1863, ch. 93, § 14, 12 Stat. 765.

[119]Gordon v. United States, 69 U.S. (2 Wall.) 561 (1864). For the story behind the Gordon decision, see The United States Court of Claims--A History, supra note 108, at 24 n.77.

[120]Act of March 17, 1866, ch. 19, 14 Stat. 9. See United States v. Jones, 119 U.S. 477 (1886).

Many valid claims against the United States remained without a forum even after the creation of the Court of Claims "either because they did not fall within [its] express jurisdictional categories . . . , or because the claimants simply could not get to the [court] in Washington. As a result, Congress continued to be plagued with private bills and petitions for relief."[121] In 1886, Representative Randolph Tucker of Virginia introduced a bill rectifying the deficiencies in the earlier acts.[122] The following year, Congress passed the Tucker Act, which extended the jurisdiction of the Court of Claims and gave the district and circuit courts concurrent jurisdiction over claims not exceeding $1,000 and $10,000, respectively.[123]

In 1982, Congress enacted the Federal Courts Improvement Act.[124] The Act merged the Court of Claims and the Court of Customs and Patent Appeals to form the United States Court of Appeals for the Federal Circuit.[125] In addition, Congress created a new article I court--the United

[121]14 Wright, Miller & Cooper, supra note 114, at 213. The Court of Claims did employ commissioners, living throughout the country, to take evidence. The United States Court of Claims--A History, supra note 108, at 33.

[122]The United States Court of Claims--A History, supra note 108, at 39-40.

[123]Act of March 3, 1887, ch. 359, 24 Stat. 505. Congress abolished the circuit courts (not to be confused with the courts of appeals) in 1911. The district courts generally assumed their original jurisdiction. Act of March 3, 1911, 36 Stat. 1087.

[124]Pub. L. No. 97-164, 96 Stat. 25.

[125]Unlike the regional courts of appeals, the Federal Circuit's appellate jurisdiction is based on subject matter rather than geography. 28 U.S.C. § 1295. For example, the court has appellate jurisdiction over appeals from the Claims Court; the Merit Systems Protection Board; the boards of contract appeals; and district court decisions, where the district court's jurisdiction was based, in whole or in part, on the Tucker Act.

States Claims Court--to assume the trial jurisdiction of the "old" Court of Claims. The United States Claims Court is now the United States Court of Federal Claims.[126]

(3) Overlapping Jurisdiction of the District Courts and the Court of Federal Claims.

(a) Concurrent and Exclusive Jurisdiction. Both the district courts and the Court of Federal Claims have concurrent jurisdiction over Tucker Act claims not exceeding $10,000.[127] The Court of Federal Claims has exclusive jurisdiction over nontort money claims against the United States that exceed $10,000.[128]

(b) Determining the Amount in Controversy. For jurisdictional purposes, the good-faith allegations of a plaintiff's complaint establishes the amount of the plaintiff's claim. The courts generally will accept such allegations without looking at the merits of the plaintiff's lawsuit.[129] The

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[126]Pub. L. No. 102-572, 106 Stat. 4516.

[127]28 U.S.C. §§ 1346(a)(2), 1491.

[128]Id. See, e.g., Mitchell v. United States, 930 F.2d 898 (Fed. Cir. 1991); Simanonok v. Simanonok, 918 F.2d 947 (Fed. Cir. 1990); Amoco Prod. Co. v. Hodel, 815 F.2d 352, 358 (5th Cir. 1987), cert. denied, 487 U.S. 1234 (1988); Matthews v. United States, 810 F.2d 109, 111 (6th Cir. 1987); Weeks Constr., Inc. v. Oglala Sioux Hsg. Auth., 797 F.2d 668, 675 (8th Cir. 1986); Chabal v. Reagan, 822 F.2d 349 (3d Cir. 1987); State of New Mexico v. Regan, 745 F.2d 1318, 1322-23 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); Goble v. Marsh, 684 F.2d 12, 15 (D.C. Cir. 1982); Keller v. MSPB, 679 F.2d 220, 222 (11th Cir. 1982). But cf. ; Pacificorp v. FERC, 795 F.2d 816, 826 (9th Cir. 1986) (Wallace, J., concurring); Bor-Son Bldg. Corp. v. Heller, 572 F.2d 174, 182 n.14 (8th Cir. 1978) (Claims Court jurisdiction not exclusive where other statutes provide jurisdiction and waive sovereign immunity). Steffan v. Cheney, 733 F. Supp. 115 (D.D.C. 1989); see generally Commonwealth of Mass. v. Departmental Grant Appeals Bd., 815 F.2d 778, 785 n.4 (1st Cir. 1987). See also Maryland Dep't of Human Resources v. Department of Health & Human Serv., 763 F.2d 1441 (D.C. Cir. 1985) (APA permits specific money relief against United States when Tucker Act doesn't apply).

[129]Zumerling v. Devine, 769 F.2d 745, 748 (Fed. Cir. 1985); Hahn v. United States, 757 F.2d 581, 587 (3d Cir. 1985).

amount of a Tucker Act claim is not the amount of money accrued at the time the lawsuit is filed; rather, it is the amount of money the plaintiff ultimately stands to recover in the case. In other words, the claim includes money damages that will accrue during the pendency of the litigation.[130] Thus, for example, if a plaintiff who has been involuntarily separated from the Army brings suit to be reinstated and demands the pay lost as the result of the separation, the amount of the pay claim is the total pay the plaintiff anticipates recovering in the case. By its very nature, the plaintiff's pay claim will grow after the complaint is filed: the plaintiff will continue to accrue pay throughout the litigation. The jurisdictional allegations of the complaint must estimate this accrual. If the plaintiff brings his pay claim in the district court, he guarantees his estimate by waiving back pay in excess of $10,000.[131] Tucker Act claims include attorneys fees, at least where the statute conferring the substantive right to relief provides for attorneys fees over and above the amount of damages.[132]

(c) Determining What Constitutes a Tucker Act Claim. No questions involving the Tucker Act are more perplexing than what constitutes a claim under the Act and under what circumstances district courts may consider demands for nonmonetary relief that are joined with Tucker Act claims. For example, if a plaintiff sues the United States seeking a declaratory judgment that will establish his right to receive money from the government in excess of $10,000, has the plaintiff stated a claim under the Tucker Act that is within the exclusive jurisdiction of the Court of Federal Claims? And must a plaintiff, who challenges as unlawful an involuntary separation from government service and seeks both reinstatement and back pay in excess of $10,000, bring his entire case before the Court of Federal Claims or may a district court hear the reinstatement claim? The Supreme Court

[130]Chabal v. Reagan, 822 F.2d 349 (3d Cir. 1987); Shaw v. Gwatney, 795 F.2d 1351, 1354-56 (8th Cir. 1986); Smith v. Orr, 855 F.2d 1544 (Fed. Cir. 1988).

[131]Chabal v. Reagan, 822 F.2d 349 (3d Cir. 1987); Shaw v. Gwatney, 795 F.2d 1351, 1356 (8th Cir. 1986). Prospective post-judgment monetary benefits do not form a part of the plaintiff's claim and need not be included in the anticipated recovery. Goble v. Marsh, 684 F.2d 12, 16 n.6 (D.C. Cir. 1982).

[132]Graham v. Henegar, 640 F.2d 732 (5th Cir. 1981).

has not directly spoken on either issue, and the decisions of the courts of appeals are hopelessly inconsistent.

As a general rule, a plaintiff invokes the Tucker Act when he or she seeks money from the United States and the action is founded upon the Constitution, federal statute, executive regulation, or government contract.[133] The nature of the cause of action does not determine whether a plaintiff's claim falls under the Tucker Act; instead, the nature of the relief requested governs the jurisdictional basis of the lawsuit. The federal courts will look beyond the facial allegations of the complaint to determine what the plaintiff hopes to acquire from the lawsuit.[134] Thus, a plaintiff cannot avoid the jurisdictional limits of the Tucker Act simply by characterizing his action as equitable in character when the result would be the equivalent of obtaining money damages. In other words, claims for monetary relief based upon equitable theories also fall within the purview of the Tucker Act, and a plaintiff may not transform a money claim into an equitable action simply by asking for injunctive, mandamus, or declaratory relief that orders the payment of money.[135]

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[133]28 U.S.C. §§ 1346(a)(2), 1491. See also United States v. Mitchell, 463 U.S. 206, 216-17 (1983); Amoco Prod. Co. v. Hodel, 815 F.2d 352, 359 (5th Cir. 1987), cert. denied, 487 U.S. 1234 (1988); Maryland Dep't of Human Resources v. Department of Health & Human Serv., 763 F.2d 1441, 1448 (D.C. Cir. 1985); Van Drasek v. Lehman, 762 F.2d 1065, 1068 (D.C. Cir. 1985); State of Tenn. ex rel. Leech v. Dole, 749 F.2d 331, 334-35 (6th Cir. 1984), cert. denied, 472 U.S. 1018 (1985).

[134]See, e.g., Amoco Prod. Co. v. Hodel, 815 F.2d 352, 361 (5th Cir. 1987); Matthews v. United States, 810 F.2d 109, 111 (6th Cir. 1987); Weeks Constr., Inc. v. Oglala Sioux Hsg. Auth., 797 F.2d 668, 675 (8th Cir. 1986); Hahn v. United States, 757 F.2d 581, 586 (3d Cir. 1985); Megapulse, Inc. v. Lewis, 672 F.2d 959, 967 (D.C. Cir. 1982); Sellers v. Brown, 633 F.2d 106, 108 (8th Cir. 1980); Estate of Watson v. Blumenthal, 586 F.2d 925, 934 (2d Cir. 1978); District of Columbia Retirement Bd. v. United States, 657 F. Supp. 428, 432 (D.D.C. 1987). But see Gower v. Lehman, 799 F.2d 925 (4th Cir. 1986) (court looked to nature of plaintiff's cause of action rather than the relief he sought in finding Tucker Act inapposite).

[135]See, e.g., Mitchell v. United States, 930 F.2d 893 (Fed. Cir. 1991); Matthews v. United States, 810 F.2d 109 (6th Cir. 1987); Commonwealth of Mass. v. Departmental Grant Appeals Bd., 815 F.2d 778, 788 (1st Cir. 1987); Amoco Prod. Co. v. Hodel, 815 F.2d 352, 361 (5th Cir. 1987); State of New Mexico v. Regan, 745 F.2d 1318, 1322 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985);

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Conversely, a claim for equitable or declaratory relief does not necessarily fall under the Tucker Act simply because it may later become the basis for a money judgment.[136] Where the equitable relief serves a significant purpose, independent of the recovery of money damages, it is not governed by the jurisdictional limitations of the Tucker Act.[137]

Federal courts have little difficulty resolving cases at the ends of the spectrum: those in which the plaintiff obviously seeks only money and those in which the plaintiff simply demands equitable relief. For example, in Polos v. United States,[138] a former civilian technician employed by the Arkansas Air National Guard challenged his termination, seeking both reinstatement and back pay in excess of $79,000. He asserted jurisdiction under the federal question statute and the Administrative Procedure Act. Because the National Guard had also separated Polos from his military status (which he did not contest), even if the court reinstated Polos to his civilian position, the National Guard would have

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Amalgamated Sugar Co. v. Bergland, 664 F.2d 818, 824 (8th Cir. 1981); Cape Fox Corp. v. United States, 646 F.2d 399 (9th Cir. 1981); Polos v. United States, 556 F.2d 903 (8th Cir. 1977); but see Wolfe v. Marsh, 846 F.2d 782 (D.C. Cir. 1988), cert. denied, 488 U.S. 942 (1988); Vietnam Veterans of America v. Secretary of the Navy, 843 F.2d 528 (D.C. Cir. 1988).

[136]Duke Power Co. v. Carolina Envt'l Study Group, 438 U.S. 59, 71 n.15 (1978); Vietnam Veterans of America v. Secretary of the Navy, 843 F.2d 528 (D.C. Cir. 1988); City of Sarasota v. EPA, 799 F.2d 674 (11th Cir. 1986); State of Tenn. ex rel. Leech v. Dole, 749 F.2d 331, 336 (6th Cir. 1984); State of Minn. v. Heckler, 718 F.2d 852, 858 (8th Cir. 1983).

[137]Hahn v. United States, 757 F.2d 581, 590 (3d Cir. 1985); State of Minn. v. Heckler, 718 F.2d 852, 859 (8th Cir. 1983); Giordano v. Roudebush, 617 F.2d 511 (8th Cir. 1980); Steffan v. Cheney, 733 F. Supp. 115 (D.D.C. 1989); District of Columbia Retirement Bd. v. United States, 657 F. Supp. 428, 432 (D.D.C. 1987).

[138]556 F.2d 903 (8th Cir. 1977).

discharged him again within 30 days. Consequently, Polos' claim was one for money--the only relief of substance he could expect from the lawsuit.[139]

By contrast, in Blassingame v. Secretary of the Navy,[140] a veteran sought judicial review of a corrections board's refusal to upgrade his discharge. Blassingame sought only equitable relief. Significantly, even if ordered by the district court, such relief would have no monetary consequences. Similarly, in Sarasota v. Environmental Protection Agency,[141] the City of Sarasota contested the Environmental Protection Agency's [EPA] denial of its federal grant application. Sarasota contended that the regulations under which EPA had acted were unlawful. The court found that, while Sarasota ultimately wanted money from the grant process, the lawsuit would not entitle the city to such relief. A favorable decision on Sarasota's claim would only remand the case to the EPA to reconsider the city's grant application. Thus, Sarasota's claim was not one for money, even though it could later serve as the basis for monetary relief.[142]

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[139]For later proceedings in Polos in the Court of Claims, see Polos v. United States, 621 F.2d 385 (Ct. Cl. 1980). Compare Stanford v. United States, 32 Fed. Cl. 363 (1994) (discharged military reservist failed to state a claim for back pay). See also Weeks Constr., Inc. v. Oglala Sioux Hsg. Auth., 797 F.2d 668 (8th Cir. 1986) (breach of contract claim for money damages); Portsmouth Redev. & Hsg. Auth. v. Pierce, 706 F.2d 471 (4th Cir. 1983) (suit to recover federal subsidies); Schulthess v. United States, 694 F.2d 175 (9th Cir. 1982) (suit to readjust civil service retirement annuity); Amalgamated Sugar Co. v. Bergland, 664 F.2d 818 (10th Cir. 1981) (suit to recover grain storage charges); Sellers v. Brown, 633 F.2d 106 (8th Cir. 1980) (suit for CHAMPUS benefits); Lee v. Blumenthal, 588 F.2d 1281 (9th Cir. 1979) (suit for redemption of federal bonds); Estate of Watson v. Blumenthal, 586 F.2d 925 (2d Cir. 1978) (same); Warner v. Cox, 487 F.2d 1301 (5th Cir. 1974) (suit to require Navy to continue paying vouchers under contract); District of Columbia Retirement Bd. v. United States, 657 F. Supp. 428 (D.D.C. 1987) (suit to require federal contribution to retirement fund).

[140]811 F.2d 65 (2d Cir. 1987).

[141]799 F.2d 674 (11th Cir. 1986).

[142]See also Fairview Township v. United States EPA, 773 F.2d 517 (3d Cir. 1985) (suit contesting denial of EPA grant); State of Tenn. ex rel. Leech v. Dole, 749 F.2d 331 (6th Cir. 1984) (suit to prevent federal government from sharing in damages recovered by state from "bid riggers" on federally-funded highway); Laguna Hermosa Corp. v. Martin, 643 F.2d 1376 (9th Cir. 1981) (suit to enforce

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Federal courts have difficulty in divining the boundaries of the Tucker Act when the precise nature of a plaintiff's claim are unclear. In such cases, most federal courts attempt to determine the prime objective of the plaintiff's suit; that is, what will the plaintiff get if he or she is successful in the litigation? If the object of the plaintiff's success is money, the Tucker Act limits should apply.

A number of courts have considered various aspects of this vexing problem of jurisdiction over a suit brought to review agency action when that action allegedly resulted in the wrongful denial of federal funds. Concerned about the integrity of the Tucker Act, the courts have developed what may be called the "prime objective" doctrine of Court of Federal Claims jurisdiction: if victory for the plaintiff in the suit would be tantamount to a release of funds in excess of $10,000, then the Court of Federal Claims has exclusive jurisdiction over the suit, even if the action is styled as one for injunctive relief.[143]

Even using this general formulation, courts have been unable to agree about what constitutes a money claim under the Tucker Act. For example, the federal courts have sharply diverged over

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extended lease agreement with the federal government); Megapulse, Inc. v. Lewis, 672 F.2d 959 (D.C. Cir. 1982) (suit to enjoin alleged violation of the Trade Secrets Act).

[143]Fairview Township v. United States EPA, 773 F.2d 517, 528 (3d Cir. 1985). See also Amoco Prod. Co. v. Hodel, 815 F.2d 352, 362 (5th Cir. 1987); Hahn v. United States, 757 F.2d 581, 590 (3d Cir. 1985); Weeks Constr., Inc. v. Oglala Sioux Hsg. Auth., 797 F.2d 668, 675 (8th Cir. 1986); United States v. City of Kansas City, 761 F.2d 605, 608-09 (8th Cir. 1985); State of New Mexico v. Regan, 745 F.2d 1318, 1322 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); Portsmouth Redev. & Hsg. Auth. v. Pierce, 706 F.2d 471, 475 (4th Cir. 1983), cert. denied, 464 U.S. 960 (1983); District of Columbia Retirement Bd. v. United States 657 F. Supp. 428, 432 (D.D.C. 1987); Powell v. Marsh, 560 F. Supp. 636, 639 (D.D.C. 1983).

whether a challenge to the government's decision to withhold grants is a claim for monetary or equitable relief.[144]

In Bowen v. Massachusetts,[145] the Supreme Court held that a district court could review a state's challenge of alleged wrongful withholding of Medicaid reimbursements by the Secretary of Health and Human Services. The Bowen court held that the district court had jurisdiction under the federal question statute and that section 702 of the APA[146] waived sovereign immunity for this claim for specific relief. The Court reasoned that the monetary aspects of this disallowance decision would not constitute damages in the sense that damages compensate for a loss, whereas Massachusetts was seeking reimbursement that it was allegedly entitled to by statute. Bowen v. Massachusetts has served to further confuse the boundaries of the Tucker Act. However, claims for back pay arising in wrongful discharge cases have generally continued to be viewed as damages in the Tucker Act context.[147]

(d) Bifurcating the Case: Separating the Tucker Act and Non-Tucker Act Claims. Related to the question of which suits fall within the Tucker Act is what happens when a plaintiff seeks both monetary and equitable relief from the federal government in a single lawsuit. If the

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[144]Compare Commonwealth of Mass. v. Departmental Grant Appeals Bd., 815 F.2d 778 (1st Cir. 1987); United States v. City of Kansas City, 761 F.2d 605 (10th Cir. 1985); State of New Mexico v. Regan, 745 F.2d 1318 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985), with Maryland Dep't of Human Resources v. Department of Health & Human Serv., 763 F.2d 1441 (D.C. Cir. 1985); State of Conn. Dept. of Income Maintenance v. Heckler, 731 F.2d 1052 (2d Cir. 1984), aff'd, 471 U.S. 524 (1985).

[145]487 U.S. 879 (1988).

[146]5 U.S.C. § 702 limits district court review of final agency action to those claims "seeking relief other than money damages."

[147]Charles v. Rice, 28 F.3d 1312 (1st Cir. 1994); Mitchell v. United States, 930 F.2d 893 (Fed. Cir. 1991); Sibley v. Ball, 924 F.2d 25 (1st Cir.); aff'd, 944 F.2d 913 (Fed. Cir. 1991). But see Ward v. Brown, 22 F.3d 516 (2d Cir. 1994); Poole v. Rourke, 779 F. Supp. 1546 (E.D. Cal. 1991).

money claim exceeds $10,000, does exclusive jurisdiction over the entire lawsuit reside in the Court of Federal Claims? Or may the district court bifurcate the case, sending the money claim to the Court of Federal Claims and retaining the equitable claim? For example, if a soldier, who has been involuntarily separated, sues in district court for reinstatement in the Army and for back pay in excess of $10,000, must the district court transfer the entire lawsuit to the Court of Federal Claims? Or may it retain the claim for reinstatement and transfer only the back pay claim?

The federal courts have taken inconsistent approaches. Some courts, fearing that a district court's decision on the retained reinstatement claim will have a preclusive effect on the money claim in the Court of Federal Claims, have refused to permit bifurcation. These courts envision a threat to the exclusive jurisdiction of the Court of Federal Claims over the money claim by the potential collateral estoppel[148] effect of the district court's adjudication of the legality of the government's action in the reinstatement claim.[149] The position of these courts is bolstered by the fact that, since 1972, the Court of Claims (and now the Court of Federal Claims) has had jurisdictional authority to award equitable relief (such as reinstatement) incidental to a money judgment.[150]

On the other hand, a number of federal courts have held that a district court can retain jurisdiction over equitable claims grounded on the same facts as the money claims over which the Court of Federal Claims has exclusive jurisdiction. In such cases, the district courts may assume jurisdiction over the equitable claims if the nonmonetary relief is the primary purpose of the lawsuit. "[T]he

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[148]Collateral estoppel prohibits relitigation of previously litigated matters in a subsequent controversy. Vestal, The Constitution & Preclusion/Res Judicata, 62 Mich. L. Rev. 33 n.3 (1963).

[149]See, e.g., Matthews v. United States, 810 F.2d 109 (6th Cir. 1987); Keller v. MSPB, 679 F.2d 220 (11th Cir. 1982); Denton v. Schlesinger, 605 F.2d 484 (9th Cir. 1979); Cook v. Arentzen, 582 F.2d 870 (4th Cir. 1978); Carter v. Seamans, 411 F.2d 767 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970).

[150]Act of Aug. 29, 1972, Pub. L. No. 92-415, 86 Stat. 652 (codified at 28 U.S.C. § 1491(a)(2)).

declaratory or injunctive relief [sought must have] significant prospective effect or considerable value apart from merely determining monetary liability of the government. . . ."[151]

Thus, for example, in Giordano v. Roudebush,[152] the Eighth Circuit affirmed the district court's retention of jurisdiction over a reinstatement claim brought by a Veterans' Administration doctor who had been discharged for unsatisfactory performance. The district court transferred the back pay claim, which was over $10,000, to the Court of Claims. The court of appeals found that the plaintiff's claims were primarily nonmonetary in nature, since the gist of his action was to get his job back and to clear his name.[153]

(e) Waiver and Transfer. Plaintiffs who have asserted a Tucker Act claim in excess of $10,000 may remain in the district court if they waive any portion of the claim in excess in $10,000.[154] The waiver must not only include the amount of the claim that antedates the lawsuit, but also any money that accrues between the filing of the complaint and the entry of final judgment.[155] The

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[151]State of Minn. v. Heckler, 718 F.2d 852, 858 (8th Cir. 1983).

[152]617 F.2d 511 (8th Cir. 1980); see also Steffan v. Cheney, 733 F. Supp. 115 (D.D.C. 1989).

[153]Id. at 515. See also Shaw v. Gwatney, 795 F.2d 1351 (8th Cir. 1986); Hahn v. United States, 757 F.2d 581 (3d Cir. 1985); Hondros v. United States Civil Serv. Comm'n, 720 F.2d 278 (3d Cir. 1983); Rowe v. United States, 633 F.2d 799 (9th Cir. 1980), cert. denied, 451 U.S. 970 (1981); Atwell v. Orr, 589 F. Supp. 511 (D.S.C. 1984); Bruzzone v. Hampton, 433 F. Supp. 92 (S.D.N.Y. 1977).

[154]See, e.g., Zumerling v. Devine, 769 F.2d 745, 748 (Fed. Cir. 1985); Professional Managers' Ass'n v. United States, 761 F.2d 740, 742-43 (D.C. Cir. 1985); Lichtenfels v. Orr, 604 F. Supp. 271, 274-75 (S.D. Ohio 1984), aff'd, 878 F.2d 1444 (Fed. Cir. 1989); Powell v. Marsh, 560 F. Supp. 636 (D.D.C. 1983); Heisig v. Secretary of the Army, 554 F. Supp. 623 (D.D.C. 1982), aff'd, 719 F.2d 1153 (Fed. Cir. 1983).

[155]Goble v. Marsh, 684 F.2d 12, 15-16 (D.C. Cir. 1982). Cf. Shaw v. Gwatney, 795 F.2d 1351 (8th Cir. 1986) (Tucker Act claim includes amount accrued during the pendency of the lawsuit).

waiver need not appear in the initial complaint, however. It may be made at a later stage in the proceedings.[156]

If the plaintiff files a Tucker Act claim over $10,000 in the district court and refuses to waive the money claim in excess of the court's jurisdiction, the district court may, in the interest of justice, transfer the action to the Court of Federal Claims.[157] The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction of an interlocutory appeal of a district court order granting or denying, in whole or in part, a transfer of a case to the Court of Federal Claims.[158]

(4) The Tucker Act and Substantive Rights to Relief. As will be discussed in greater detail,[159] the Tucker Act is only a jurisdictional statute. It does not create any substantive rights enforceable against the United States for money damages.[160] Instead, a plaintiff must show a contract, or a constitutional, statutory, or regulatory provision that grants a right to monetary relief from the United

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[156]See Steffan v. Cheney, 733 F. Supp. 115, 120 n.2 (D.D.C. 1989), citing Heisig v. Secretary of the Army, 554 F. Supp. 623 (D.D.C. 1982), aff'd, 719 F.2d 1153 (Fed. Cir. 1983).

[157]28 U.S.C. § 1631. This statute simply gives the district court the requisite jurisdiction to transfer the case. If in the interest of justice the court does not transfer the case, it must dismiss the case for lack of jurisdiction. See Goad v. United States, 661 F. Supp. 1073 (S.D. Tex. 1987), aff'd in part, vacated in part, 837 F.2d 1096 (Fed. Cir. 1987), cert. denied, 485 U.S. 906 (1992).

[158]Judicial Improvements and Access to Justice Act, § 501, Pub. L. No. 100-702, 102 Stat. 4652 (1988).

[159]See infra § 4.3b.(2)(a).

[160]United States v. Testan, 424 U.S. 392 (1976).

States.[161] The courts disagree about whether the absence of a substantive right to monetary relief is a defect of a jurisdictional character in a suit under the Tucker Act.[162]

Examples of statutes creating substantive rights to pay are the Back Pay Act, 5 U.S.C. § 5596(b), for civilian employees of the government and the military pay statute, 37 U.S.C. § 204, for members of the military services.[163] Nonappropriated fund employees, who are not covered by the Back Pay Act, have no substantive basis for back pay claims against the United States absent an employment contract.[164]

(5) Appeal of Tucker Act Cases.

(a) General Rules. Under the Federal Courts Improvement Act of 1982,[165] the Court of Appeals for the Federal Circuit has exclusive appellate jurisdiction over district court judgments whenever the subject-matter jurisdiction of the district courts is based, in whole or in part, on the Tucker Act.[166] Even where a district court's subject-matter jurisdiction is also based on some other

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[161]United States v. Testan, 424 U.S. 392 (1976); United States v. Woods, 986 F.2d 669 (3d Cir.), cert. denied, 510 U.S. 826 (1993).

[162]Compare Commonwealth of Mass. v. Departmental Grant Appeals Bd., 815 F.2d 778, 787 (1st Cir. 1987); Maryland Dep't of Human Resources v. Department of Health & Human Serv., 763 F.2d 1441, 1449-50 (D.C. Cir. 1985), with Hahn v. United States, 757 F.2d 581, 588 n.4 (3d Cir. 1985). See generally Bell v. Hood, 327 U.S. 678 (1946).

[163]See, e.g., Murphy v. United States, 993 F.2d 871 (Fed. Cir. 1993), cert. denied, 511 U.S. 1019 (1994); Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979).

[164]AAFES v. Sheehan, 456 U.S. 728 (1982); Lunetto v. United States, 560 F. Supp. 712 (N.D. Ill. 1983).

[165]Pub. L. No. 97-164, § 127, 96 Stat. 37 (codified at 28 U.S.C. § 1295(a)(2)).

[166]United States v. Hohri, 482 U.S. 64 (1987); Sibley v. Ball, 924 F.2d 25 (1st Cir.); aff'd, 944 F.2d 913 (Fed. Cir. 1991); Parker v. King, 935 F.2d 1174 (11th Cir. 1991), reh'g denied, 948 F.2d 1298

footnote continued next page

statute, if the plaintiff makes any claim that invokes the Tucker Act, the entire case must be appealed to the Federal Circuit.[167] A plaintiff invokes the Tucker Act when his or her claim "(1) seek[s] money (2) not exceeding $10,000 (3) from the United States and (4) [is] founded either upon a contract or a provision of 'the Constitution, or any Act of Congress, or any regulation of an executive department,' that 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'"[168] If all of these elements are present, the claim falls under the Tucker Act and the Federal Circuit has exclusive jurisdiction over the appeal.[169] The Court of Appeals for the Federal Circuit also has exclusive jurisdiction over all appeals from the United States Court of Federal Claims.[170]

(b) Exceptions. The federal courts have carved a number of exceptions out of the general rule that appeal of all cases invoking the Tucker Act is to the Federal Circuit. For example, where a plaintiff's Tucker Act claim is frivolous or exceeds the jurisdiction of the district court, appeal to the regional court of appeals is appropriate.[171]

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(..continued)
(11th Cir. 1991), cert. denied, 505 U.S. 1229 (1992); Williams v. Secretary of the Navy, 787 F.2d 552, 558 (Fed. Cir. 1986); Bray v. United States, 785 F.2d 989, 990 (Fed. Cir. 1986); Maier v. Orr, 754 F.2d 973, 980-81 (Fed. Cir. 1985).

[167]United States v. Hohri, 482 U.S. 64 (1987); Van Drasek v. Lehman, 762 F.2d 1065, 1068 (D.C. Cir. 1985); Professional Managers' Ass'n v. United States, 761 F.2d 740, 743-44 (D.C. Cir. 1985).

[168]Van Drasek v. Lehman, 762 F.2d 1065, 1068 (D.C. Cir. 1985), quoting United States v. Mitchell, 463 U.S. 206 (1983).

[169]Id.

[170]28 U.S.C. § 1295(a)(3).

[171]Empire Kosher Poultry, Inc. v. Hallowell, 816 F.2d 907, 917 (3d Cir. 1987); Shaw v. Gwatney, 795 F.2d 1351, 1353 (8th Cir. 1986); Sharp v. Weinberger, 798 F.2d 1521 (D.C. Cir. 1986); Van Drasek v. Lehman, 762 F.2d 1065, 1070 (D.C. Cir. 1985); Doe v. United States Dep't of Justice, 753 F.2d 1092, 1101-02 (D.C. Cir. 1985).

Moreover, while not all courts agree, where a claim may be brought under statutes that independently confer jurisdiction upon the district court to award money damages against the United States, the claim is not deemed to be based on the Tucker Act for purposes of appellate jurisdiction.[172]

The jurisdiction of the Federal Circuit, however, may not be avoided by artful pleading. "[N]either a plaintiff's nor a district court's mere recitation of the basis for jurisdiction may alter the scope of [the Federal Circuit's jurisdiction]. . . . [The court] will look to the true nature of the action in the district court in determining jurisdiction of an appeal. . . . A civil action for the recovery of money against the United States cannot be disguised by couching it in [other] terms."[173] The Court of Appeals for the Seventh Circuit, citing the need for judicial efficiency and economy, refused to transfer a Tucker Act claim to the Federal Circuit that had already been decided by the court.[174] While recognizing that the liberal language of 28 U.S.C. § 1295(a)(2) required such a transfer, the Seventh Circuit held that it would be inefficient and unfair to vacate the court's opinion simply to give the Government--the losing party--the opportunity to reargue the case before the Federal Circuit.[175]

(c) Interlocutory Appeals. As is apparent, the overlapping jurisdiction of the Court of Federal Claims and district courts in cases involving monetary claims against the United States raises difficult jurisdictional issues. Prior to 1988, a party who believed it was improperly before

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[172]Van Drasek v. Lehman, 762 F.2d 1065, 1070-71 (D.C. Cir. 1985).

[173]Maier v. Orr, 754 F.2d 973, 982 (Fed. Cir. 1985). See also Sibley v. Ball, 924 F.2d 25 (1st Cir. 1991); Wronke v. Marsh, 767 F.2d 354, 355 (7th Cir. 1985), rev'd 787 F.2d 1569 (Fed. Cir. 1986), cert. denied, 479 U.S. 853 (1986); Megapulse, Inc. v. Lewis, 672 F.2d 959, 967 (D.C. Cir. 1982). Where a plaintiff obviously does not seek money, however, the courts will not infer a Tucker Act claim. ben Shalom v. Secretary of the Army, 807 F.2d 982, 987 (Fed. Cir. 1986).

[174]Squillacote v. United States, 747 F.2d 432 (7th Cir. 1984), cert. denied, 471 U.S. 1016 (1985).

[175]Id. at 439-40. But see Professional Managers' Ass'n v. United States, 761 F.2d 740, 745 (D.C. Cir. 1985) (refusing to follow Squillacote). See also Wronke v. Marsh, 767 F.2d 354 (7th Cir. 1985) (limiting Squillacote to its unique facts).

the district court had to wait until the conclusion of the trial court proceeding before contesting jurisdiction at the appellate level. In 1988, Congress enacted legislation to facilitate expeditious review of intricate questions about Tucker Act jurisdiction.[176] The statute authorizes an interlocutory appeal to the Court of Appeals for the Federal Circuit of any district court order which grants or denies, in whole or in part, a motion to transfer an action to the Court of Federal Claims.[177] When an interlocutory appeal is filed, the district court must suspend proceedings until the Federal Circuit decides the jurisdictional question.[178]

d. The Federal Tort Claims Act.

(1) General. The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2761-2780, creates jurisdiction for tort suits against the United States. The jurisdictional provision of the Act is 28 U.S.C. § 1346(b), which provides:

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

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[176]Pub. L. No. 100-702, § 501, 102 Stat. 4652 (codified at 28 U.S.C. § 1292(d)(4)).

[177]See Kanemoto v. Reno, 41 F.3d 641 (Fed. Cir. 1994) Mitchell v. United States, 930 F.2d 893 (Fed. Cir. 1991).

[178]See 28 U.S.C. § 1292(d)(4).

(2) Historical Origins. Before 1855, the doctrine of sovereign immunity barred judicial resolution of claims for money damages against the United States. The only recourse available to claimants was to seek relief from Congress through private bills.[179] In 1855, to relieve the workload and inequities caused by the private bill procedure, Congress created the Court of Claims.[180] The new court received jurisdiction to determine all claims founded upon any law of Congress, or regulation of an executive department, or any contact, express or implied, with the United States.[181] Although its early jurisdictional statutes made no mention of tort claims,[182] the Court of Claims, and later the Supreme Court, held that Congress had not conferred upon the Court of Claims jurisdiction to adjudicate tort suits.[183] Under the Tucker Act, enacted in 1887, Congress expressly limited the Court of Claims jurisdiction to cases "not sounding in tort."[184]

From the time of the creation of the Court of Claims, Congress slowly reduced the government's sovereign immunity from tort claims. During the late 19th and early 20th centuries,

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[179]United States v. Mitchell, 463 U.S. 206, 212 (1983). See also supra notes 108-111 and accompanying text.

[180]Act of Feb. 24, 1855, 10 Stat. 612.

[181]Id.

[182]Id.; Act of March 3, 1863, 12 Stat. 765; Act of March 17, 1866, 14 Stat. 9.

[183]See, e.g., Morgan v. United States, 81 U.S. (14 Wall.) 531 (1871); Gibbons v. United States, 75 U.S. (8 Wall.) 269 (1868); Spicer v. United States, 1 Ct. Cl. 316 (1865); Pitcher v. United States, 1 Ct. Cl. 17 (1863). See generally 1 L. Jayson, Handling Federal Tort Claims 2-11 - 2-14 (1986).

[184]Act of March 3, 1887, 24 Stat. 505. The House bill would have given the court jurisdiction over tort claims. The Senate, however, refused to accede and tort claims were excluded from the law. L. Jayson, supra note 183, at 2-16 - 2-17.

Congress provided limited judicial and administrative remedies for particular torts caused by agents and employees of the United States.[185]

As the federal government grew, so did the torts committed by its employees. The burden of private relief bills, as well as pressure from the academic community, the private bar, and the judicial and executive branches, forced Congress to consider a general waiver of the federal government's sovereign immunity from tort claims.[186] From the 1920's to 1946, Congress debated various proposals for a general tort claims act.[187] The Federal Tort Claims Act finally became law in 1946.[188] In 1966, Congress amended the Act to make administrative review of tort claims a prerequisite to suit in the federal courts.[189]

(3) Jurisdictional Prerequisites. A plaintiff must meet two jurisdictional prerequisites to perfect a claim under the Federal Tort Claims Act. First, the plaintiff must present the claim to the appropriate federal agency within two years of the accrual of the cause of action.[190] At a minimum, this administrative claim must consist of a demand in writing for a specified sum of money.[191] A failure either to file an administrative claim or to file it within two years of its accrual will deprive a district court of

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[185]L. Jayson, supra note 183, at 2-18. These statutes are described in id. at 2-19 - 2-45. They include the Military Claims Act of July 3, 1943, 57 Stat. 372; the Suits in Admiralty Act, Act of March 9, 1920, 41 Stat. 1525; and the Federal Employees' Compensation Act, Act of Sept. 7, 1916, 39 Stat. 742.

[186]L. Jayson, supra note 183, at 2-51, 2-67.

[187]These bills are described in id. at 2-54 to 2-67.

[188]Pub. L. No. 79-601, 60 Stat. 812 (1946) (codified at 28 U.S.C. §§ 1346(b), 2671 - 2680).

[189]Act of July 18, 1966, Pub. L. No. 89-506, 80 Stat. 306 (codified at 28 U.S.C. § 2675).

[190]28 U.S.C. §§ 2401(b), 2675 (1982). See generally L. Jayson, supra note 183, at §§ 135, 138.

[191]See, e.g., Montoya v. United States, 841 F.2d 102 (5th Cir. 1988); Burns v. United States, 764 F.2d 722 (9th Cir. 1985).

jurisdiction over the claim. Neither failure can be waived.[192] Second, the plaintiff must file suit in the district court within six months of the denial of the administrative claim by the agency, or the claim is jurisdictionally barred.[193] Under the Feres doctrine, military personnel may not bring claim under the Federal Tort Claims Act.[194]

(4) The Federal Tort Claims Act and Substantive Rights to Relief. Like the Tucker Act, the Federal Tort Claims Act does not provide an independent cause of action or a substantive right enforceable against the United States. The statute simply confers jurisdiction and waives sovereign immunity whenever the cause of action or the substantive right exists.[195] In general, the Act confers jurisdiction on the district courts to adjudicate a limited number of state-created tort claims against the federal government.[196]

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[192]See, e.g., Magruder v. Smithsonian Inst., 758 F.2d 591, 593 (11th Cir. 1985) (two-year statute of limitations); Lee v. United States, 980 F.2d 1337 (10th Cir. 1992), cert. denied, 509 U.S. 913 (1993); Avila v. INS, 731 F.2d 616, 618 (9th Cir. 1984) (administrative claim requirement); Jackson v. United States, 730 F.2d 808, 809 (D.C. Cir. 1984) (administrative claim requirement); Lykins v. Pointer, Inc., 725 F.2d 645, 646 (11th Cir. 1984) (administrative claim requirement); Gould v. Dep't of Health and Human Services, 905 F.2d 738 (4th Cir. 1990) (two-year statute of limitations); Richman v. United States, 709 F.2d 122, 124 (1st Cir. 1983) (two-year statute of limitations). Cf. United States v. Kubrick, 444 U.S. 111, 117-18 (1979) (statute of limitations a condition on the waiver of sovereign immunity under the Federal Tort Claims Act).

[193]28 U.S.C. § 2401(b). See, e.g., McNeil v. United States, 964 F.2d 647 (7th Cir. 1992), aff'd, 508 U.S. 106 (1993); Houston v. U.S.P.S., 823 F.2d 896, 903 (5th Cir. 1987); Allen v. Veterans Admin, 749 F.2d 1386 (9th Cir. 1984); Willis v. United States, 719 F.2d 608 (2d Cir. 1983); Woirhaye v. United States, 609 F.2d 1303, 1306 (9th Cir. 1979).

[194]See, e.g., Miller v. United States, 42 F.3d 297 (5th Cir. 1995) (Naval Academy midshipman could not sue for physical disability resulting from a sailing accident during training).

[195]Graham v. Henegar, 640 F.2d 732 (5th Cir. 1981); Reynolds v. United States, 643 F.2d 707 (10th Cir. 1981), cert. denied, 454 U.S. 817 (1981).

[196]28 U.S.C. § 1346(b). See L. Jayson, supra note 183, at 1-150 - 1-151.

e. Mandamus.

(1) General. The mandamus statute, 28 U.S.C. § 1361, grants "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." The plaintiff must have a clear right to the relief sought, and the duty on the part of the defendant must be ministerial, as opposed to discretionary, in character.[197]

(2) Historical Origins.

(a) Mandamus before 1962. "The writ of mandamus was developed by the English law courts as a broad remedial measure by which parties could be compelled to perform in a certain manner."[198] After the American Revolution, state courts in the United States adopted the English mandamus remedy, "but in the federal courts the issuance of the writ became intertwined with basic questions of separation of powers and federal court jurisdiction."[199] In 1803, the Supreme Court decided in Marbury v. Madison[200] that it lacked original jurisdiction under the Constitution to grant writs of mandamus. Ten years later, in M'Intire v. Wood,[201] the Court held that the lower federal courts were without jurisdiction to grant original writs of mandamus under the Judiciary Act of 1789. In 1838, however, the Supreme Court found that the Circuit Court for the District of Columbia, as the inheritor of

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[197]See, e.g., Matthews v. United States, 810 F.2d 109 (6th Cir. 1987); Turner v. Weinberger, 728 F.2d 751, 755 (5th Cir. 1984); Carter v. Seamans, 411 F.2d 767 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970); Atwell v. Orr, 589 F. Supp. 511, 516-17 (D.S.C. 1984).

[198]French, The Frontiers of the Federal Mandamus Statute, 21 Vill. L. Rev. 637, 640 (1976).

[199]Id. at 641.

[200]5 U.S. (1 Cranch) 137 (1803).

[201]11 U.S. (7 Cranch) 504 (1813).

the common law jurisdiction of Maryland, which ceded the District to the Federal Government, had original jurisdiction to issue writs of mandamus.[202] Thus, until 1962, only the federal court in the District of Columbia had power to grant mandamus relief in original actions.[203] Even where mandamus was available, the scope of the remedy was relatively constricted. Mandamus would only issue to compel a ministerial--as opposed to a discretionary--function where no other adequate specific remedy existed.[204] Mandamus issues to compel an officer to perform a purely ministerial duty. It cannot be used to compel or control a duty in the discharge of which by law he is given discretion. The duty may be discretionary within limits. He cannot transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them. The power of the court to intervene, if at all, thus depends upon what statutory discretion he has. Under some statutes, the discretion extends to a final construction by the officer of the statute he is executing. No court in such case can control by mandamus his interpretation, even if it may think it erroneous.[205]

(b) The Mandamus and Venue Act of 1962. In response to pressure by the western states to decentralize mandamus jurisdiction outside the District of Columbia, Congress enacted the Mandamus and Venue Act of 1962,[206] Under section 1361, all federal district courts, not just the District Court for the District of Columbia, could exercise mandamus jurisdiction. While the Act

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[202]Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838).

[203]Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 312 (1967).

[204]Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 614 (1838).

[205]Work v. United States ex rel. Rives, 267 U.S. 175, 177 (1925). See also United States ex rel. Girard Trust Co. v. Helvering, 301 U.S. 540, 543-44 (1937); Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 218 (1930); United States ex rel. Dunlap v. Black, 128 U.S. 40, 48 (1888); Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515-16 (1840); Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 169-71 (1803).

[206]Pub. L. No. 87-748, 76 Stat. 744 (codified at 28 U.S.C. §§ 1361, 1391(e)). See Byse & Fiocca, supra note 202, at 313-18; French, supra note 198, at 644.

expanded the courts that could grant mandamus relief, however, "it [was] not intended to expand either the availability or scope of judicial review of federal administrative actions."[207] "Section 1361 does not enlarge the instances in which the writ of mandamus will issue, or affect the doctrine of sovereign immunity or the doctrine of separation of powers of the branches of the federal government."[208] Consequently, mandamus under section 1361 continues to be governed by traditional limits on the remedy.[209]

The mandamus remedy is discussed in greater detail in chapter 4.

f. Habeas Corpus.

(1) General. As noted in the previous chapter, 28 U.S.C. §§ 2241-2255 set out federal habeas corpus procedures. The operative jurisdictional provision of the habeas corpus statutes is 28 U.S.C. § 2241, which provides:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdiction. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless--

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[207]Byse & Fiocca, supra note 203, at 319.

[208]7B Moore's Federal Procedure JC-548-549 (1984). See also Project, Federal Administrative Law Developments-1972; Mandamus in Administrative Actions: Current Approaches, 1973 Duke L.J. 207, 209.

[209]4 K. Davis, Administrative Law Treatise § 23.8 (1983).

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

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(2) Historical Origins.

(a) Early English History. The writ of habeas corpus originated in England as a device for compelling a defendant's appearance before the King's courts.[210]

It was a form of mesne process--a procedural order issued after the initiation of legal proceedings--by which a party to a lawsuit (usually the defendant) could be taken into custody by the

[210]Duker, The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame, 53 N.Y.U.L. Rev. 983, 1053 (1978). A number of legal scholars, including Coke and Blackstone, have linked the writ of habeas corpus to the Magna Carta, writing that the writ had its origins in the Great Charter. See D. Meador, Habeas Corpus and Magna Carta: Dualism of Power and Liberty 3-4, 22-30 (1966). In fact, the two were unrelated; habeas corpus predates the Magna Carta. Id. at 5.

sheriff and forced to appear in court.[211] This procedural device was firmly established in England by 1230.[212] Between the mid-fourteenth century and the mid-sixteenth century, the common law courts used the writ in their power struggles with inferior courts and rival central courts, such as the Chancery, the Admiralty, and the Star Chamber.[213] The writ was employed as a means to deprive these rival courts of their ultimate sanction--imprisonment, and it enabled the common law courts to enlarge and consolidate their jurisdictional authority.[214] In the late-sixteenth century and early-seventeenth century, the writ began to be used to challenge arbitrary confinement by the Crown, especially the Privy Council and the Star Chamber.[215] In early cases, the writ proved to be ineffective against the power of the King.[216]

In its struggles with the Crown during the seventeenth century, however, Parliament enacted several measures to strengthen the efficacy of the writ, including the Petition of Right,[217] the Habeas Corpus Act of 1641,[218] and the Habeas Corpus Act of 1679.[219] Moreover, several judicial opinions

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[211]D. Meador, supra note 210, at 8; Duker, supra note 210, at 992, 995; Developments in the Law--Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1042 (1969).

[212]Duker, supra note 210, at 992.

[213]Id. at 1007; D. Meador, supra note 210, at 12; Developments in the Law--Federal Habeas Corpus, supra note 211, at 1042.

[214]Duker, supra note 210, at 1012, 1015-1025; Developments in the Law--Federal Habeas Corpus, supra note 211, at 1042.

[215]Duker, supra note 210, at 1026; Developments in the Law--Federal Habeas Corpus, supra note 211, at 1043.

[216]See Darnel's Case, 3 Cobbett's St. Tr. 1 (K.B. 1627) (court refused to look beyond return stating prisoner held by command of the King). See generally D. Meador, supra note 210, at 13-19.

[217]3 Car. I, c. I.

[218]16 Car. I, c. 10.

[219]31 Car. 2, c. 2.

during this period further enhanced habeas corpus as a bulwark against the arbitrary exercise of executive power.[220] By the time of the American Revolution, the writ of habeas corpus had become an effective means of protecting Englishmen from unlawful imprisonment by the government.[221]

(b) Development of the Writ in the United States. Although Parliament's habeas corpus legislation was never formally extended to the American colonies, "the writ as a part of the common law was considered to be the heritage of every Englishman."[222] "This claim received legitimation in colonial charters and later in state legislation that adopted in substance the English Habeas Corpus Act of 1679."[223] After independence, there was some debate whether to include a habeas corpus provision in the federal constitution.[224] The Constitutional Convention finally settled upon a provision barring the writ's suspension.[225]

Following the adoption of the Constitution, the Congress passed the Judiciary Act of 1789, "which empowered federal courts to issue writs of habeas corpus to prisoners 'in custody under or by

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[220]E.g., Chamber's Case, 79 Eng. Rep. 746 (K.B. 1630); Bushell's Case, 124 Eng. Rep. 1006 (C.P. 1670).

[221]Duker, supra note 210, at 1054.

[222]Developments in the Law--Federal Habeas Corpus, supra note 211, at 1045.

[223]Rosen, The Great Writ--A Reflection of Societal Change, 44 Ohio St. L.J. 337, 338 (1983). See also D. Meador, supra note 210, at 30-32.

[224]D. Meador, supra note 210, at 32, 34; Rosen, supra note 222, at 338.

[225]Rosen, supra note 223, citing U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it").

colour of the authority of the United States. . . ."[226] The federal courts have had jurisdiction to grant habeas corpus relief ever since.[227]

(3) Custody Requirement. Habeas corpus is the classic remedy for relief from unlawful custody.[228] Indeed, custody is a jurisdictional requirement for habeas relief.[229] Habeas corpus is a principal means of collaterally attacking the sentence to confinement of a court-martial.[230] It is also a remedy for persons claiming they are being held improperly by military authorities.[231] Thus, a servicemember denied an administrative separation can litigate the propriety of the denial in a habeas corpus proceeding. Retention in the military, even though not constituting arrest or imprisonment, is regarded as "custody" for purposes of habeas corpus jurisdiction.[232]

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[226]Developments in the Law--Federal Habeas Corpus, supra note 211, at 1045, quoting Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

[227]See infra chapter 8 for a discussion of the use of habeas corpus to collaterally challenge courts-martial.

[228]E.g., Johnson v. Avery, 393 U.S. 483, 485 (1969); Fay v. Noia, 372 U.S. 391, 409 (1963).

[229]28 U.S.C. § 2241; Wales v. Whitney, 114 U.S. 564 (1885). See generally Developments in the Law--Federal Habeas Corpus, supra note 211, at 1072. "Until recently the custody requirement was strictly construed." Hart & Wechlsler's Federal Courts, supra note 11, at 1507. In the 1960's the Supreme Court began to expand the notion of custody. See, e.g., Maleng v. Cook, 490 U.S. 488 (1989) (petitioner "in custody" for purposes of challenging State court conviction even though not currently serving sentence under state conviction because of confinement in federal prison on federal charges where state has placed detainer on prisoner); Hensley v. Municipal Court, 411 U.S. 345 (1973) (petitioner free on bail in custody for purpose of habeas corpus); Jones v. Cunningham, 371 U.S. 236 (1963) (petitioner free on parole in custody). See also Carafas v. LaVallee, 391 U.S. 234 (1968) (if person in custody when petition filed, court retains habeas jurisdiction even if petitioner is later unconditionally released).

[230]See, e.g., Burns v. Wilson, 346 U.S. 137 (1953); Ex parte Reed, 100 U.S. 13 (1879).

[231]See, e.g., Parisi v. Davidson, 405 U.S. 34 (1972); Leondard v. Dep't of the Navy, 786 F. Supp. 82 (D. Me. 1992).

[232]Schlanger v. Seamans, 401 U.S. 487 (1971).

Similarly, a member of the Army Reserve ordered to involuntary active duty is also in "custody" for purposes of the habeas statute.[233]

(4) Venue. A habeas petitioner must bring his action in the district where the custodian resides.[234] For military prisoners, jurisdiction is in the district where the commander of the confinement facility is located.[235] Active duty servicemembers can challenge continued military service in the federal districts where their "chain-of-command" resides, normally at their assigned installation.[236] Reservists who are not assigned to any particular unit may be able to file their habeas petitions in the judicial district in which they have had the most significant contacts with the military.[237]

g. Civil Rights Jurisdiction. The jurisdictional predicate for lawsuits under the various civil rights statutes[238] is 28 U.S.C. § 1343, which provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of title 42;

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[233]Strait v. Laird, 406 U.S. 341 (1972).

[234]28 U.S.C. §2241(a). See generally Hart & Wechsler's Federal Courts, supra, note 11, at 1430-34.

[235]E.g., Chatman v. Hernandez, 805 F.2d 453 (1st Cir. 1986); Scott v. United States, 586 F. Supp. 66 (E.D. Va. 1984).

[236]Schlanger v. Seamans, 401 U.S. 487 (1971); Centa v. Stone, 755 F. Supp. 197 (N.D. Ohio 1991).

[237]Strait v. Laird, 406 U.S. 341 (1972).

[238]E.g., 42 U.S.C. §§ 1981, 1983, 1985, 2000e. See, e.g., Drumheller v. Department of the Army, 49 F.3d 1566 (Fed. Cir. 1995) (civilian employee of the Army was not denied constitutional rights when her security clearance was revoked).

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

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h. Other Jurisdictional Bases for Suit.

(1) Statutes Providing Jurisdiction. A number of statutes provide jurisdiction for lawsuits against the military in special types of cases. For example, both the Freedom of Information Act,[239] and the Privacy Act,[240] provide jurisdictional bases for litigation in the district courts.

(2) Statutes Not Providing Jurisdiction. Plaintiffs' counsel often incorrectly cite several other statutory provisions as jurisdictional grounds for suit. Most common are the

[239]5 U.S.C. § 552(a)(4).

[240]5 U.S.C. § 552a(g)(1). See, e.g., Balbinot v. United States, 872 F. Supp. 546 (C.D. Ill. 1994) (false statement by a former commander of a Naval enlistee was not a "record" so the statement did not violate the Privacy Act).

Administrative Procedure Act,[241] the Declaratory Judgment Act,[242] and civil rights statutes besides Title VII of the Civil Rights Act of 1964.[243]

**3.4 Justiciability.**

a. General. The power of the federal courts is not only confined to the jurisdiction granted by Congress. Federal court jurisdiction also is limited by the "case" or "controversy" requirement of article III of the Constitution. The Supreme Court has derived from the words "case" and "controversy" an entire body of doctrine describing the circumstances under which federal courts may or may not exercise their subject matter jurisdiction.[244] The terms "case" and "controversy" embody two separate concepts: in part the words limit the courts to questions presented in an adversary context, and in part the words involve concerns that federal courts should not intrude into areas constitutionally committed for decision to the other two branches of the Government.[245] "Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine."[246] The dual limits are known as the adversarial prong and the political question prong of justiciability.

The various rules embodying justiciability are not simply hypertechnical procedural hurdles devised by the Supreme Court to avoid the adjudication of substantive issues. Instead, these doctrines

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[241]5 U.S.C. §§ 701-06. See Califano v. Sanders, 430 U.S. 99 (1977).

[242]28 U.S.C. §§ 2201-02. See Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1952).

[243]See, e.g., Holloway v. Bentsen, 870 F. Supp. 898 (N.D. Ind. 1994) (suit by a federal employee against other federal employees under 42 U.S.C. § 1981 dismissed).

[244]L. Tribe, supra note 13, at 52-53.

[245]Flast v. Cohen, 392 U.S. 83, 94-95 (1968).

[246]Id. at 95 (emphasis added).

limiting who can challenge governmental action[247] and when the challenge can be brought involve "fundamental assumptions as to the Court's appropriate role in our constitutional scheme."[248] They define the proper role of the federal courts in our tripartite system of government, governing the circumstances under which the courts can intrude into the business of the other branches of the government.[249]

b. Adversarial Prong. The adversarial prong of justiciability requires that a case be presented "in a form historically viewed as capable of resolution through the judicial process."[250]

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[247]The "case or controversy" requirement arises infrequently in private litigation. Justiciability comes almost entirely from lawsuits challenging governmental actions. C. Wright, supra note 11, at 62.

[248]Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1363-64 (1973). See also Rescue Army v. Municipal Court, 331 U.S. 549, 570 (1947); Brilmayer, The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement, 93 Harv. L. Rev. 297, 302-15 (1979).

[249]The "case of controversy" requirement is also "intimately related to the doctrine of judicial review." C. Wright, supra note 11, at 54. In Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the Court reasoned that the power to declare a law unconstitutional was incidental to its obligation to decide the particular case before it: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." Id. at 177 (emphasis added). The orthodox view of Marbury is that federal courts can decide constitutional questions only in the context of cases that conform to the traditional model of private litigation. C. Wright, supra note 11, at 54. See also Ashwander v. TVA, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring); Liverpool, N.Y. & Philadelphia Steamship Co. v. Commissioner of Emigration, 113 U.S. 33, 39 (1885); G. Gunther, Constitutional Law 1533-34 (11th ed. 1985); Monaghan, supra note 248, at 1365-66.

[250]Flast v. Cohen, 392 U.S. 83, 94-95 (1968). See, e.g., Bunch v. United States, 33 Fed. Cl. 337 (1995) (suit by Colonel Bunch seeking an order that he be promoted to brigadier general and given retroactive pay raises was not justiciable so the court had no power to grant the relief sought); Lee v. United States, 32 Fed. Cl. 530 (1995) (Air Force Reserve officer's discharge was nonjusticiable as there was no standard by which the court could measure the actions of the Air Force); Clark v. Widnall, 51 F.3d 917 (10th Cir. 1995) (Reserve officer failed to demonstrate that military authority acted in any way that would justify interference by a civil court).

Specifically, this includes the prohibition against advisory opinions, the requirements of ripeness and standing, and the proscription against deciding moot cases.

(1) Advisory Opinions. "[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions. . . ."[251] An advisory opinion is the legal opinion of a court outside the context of a "case or controversy." It is an answer to a hypothetical question of law unconnected with any particular case. As such, advisory opinions do not fall within the traditional view of the judicial function.[252]

Very early in the nation's history the federal courts refused to render advisory opinions. In Hayburn's Case,[253] a number of Supreme Court justices sitting as circuit judges would not give advice to Congress and the Secretary of War on the disposition of Revolutionary War pension applications. The justices reasoned that the rendition of such advice did not fall within the ambit of the judicial function.[254] The following year, the Court refused to answer questions submitted by President

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[251]C. Wright, supra note 11, at 65.

[252]See Hart & Wechsler's Federal Courts, supra note 11, at 66:

> [T]he judicial function is essentially the function (in such cases as may be presented for decision) of authoritative application to particular situations of general propositions drawn from preexisting sources--including as a necessary incident the function of determining the facts of the particular situation and of resolving uncertainties about the content of the applicable general propositions.

[253]2 U.S. (2 Dall.) 409 (1792).

[254]The fatal defect in the pension adjudication scheme was that the circuit courts' decisions were subject to the revision of the Secretary of War and Congress. Thus, the decisions lacked finality; they amounted to little more than advice. See also Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948); Gordon v. United States, 69 U.S. (2 Wall.) 561 (1864); United States v. Ferreira, 54 U.S. (13 How.) 40 (1852).

Washington, through Secretary of State Jefferson, about America's neutrality in the war between France and Great Britain.[255]

While the questions of advisory opinions rarely appear in their pure form,[256] the concerns that underlie the prohibition against advisory opinions also support the other limits imposed by the "case or controversy" requirement.[257]

(2) Ripeness.

(a) General. The ripeness doctrine involves both jurisdictional limits imposed by article III's requirement of a "case" or "controversy," and prudential concerns arising from the problems of prematurity and abstractness that may present insurmountable obstacles to the exercise

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[255]See Hart & Wechsler's Federal Courts, supra note 11, at 64-66. For example, Jefferson asked: "Do the treaties between the United States and France give to France or her citizens a right, when at war with a power with whom the United States are at peace, to fit out originally in and from the ports of the United States vessels armed for war, with or without commission?" "Do the laws authorize the United States to permit to France the erection of Courts within their territory and jurisdiction for the trial and condemnation of prizes, refusing that privilege to a power at war with France?" "May we, within our ports, sell ships to both parties, prepared merely for merchandise? May they be pierced for guns?" Id. at 64-65.

[256]Early in this century, many feared that the declaratory judgment remedy would contravene the prohibition against advisory opinions. See Willing v. Chicago Auditorium Ass'n, 277 U.S. 274 (1928); Muskrat v. United States, 219 U.S. 346 (1911). These fears dissipated after the Supreme Court's decision in Nashville, C & St. Louis Ry. v. Wallace, 288 U.S. 249 (1933), in which the Court reviewed a state court declaratory judgment. And following enactment of the Federal Declaratory Judgment Act of 1934, 48 Stat. 955, the Court upheld the constitutionality of declaratory relief. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937). See infra chapter 4.

[257]G. Gunther, supra note 249, at 1537-38. See Hart & Wechsler's Federal Courts, supra note 11, at 67, for some of the considerations justifying the prohibition against advisory opinions. Most deal with the limited competence of courts to deal with questions outside the context of a concrete case. The prohibition also narrows the circumstances under which the courts may interfere with the political branches of government.

of a federal court's jurisdiction, even though jurisdiction is technically present.[258] Simply put, when a case is not ripe for adjudication, it is not yet ready for judicial review. It is a matter of timing.[259] The purpose of the doctrine is to avoid premature adjudication of suits, and to protect executive agencies from judicial interference until administrative decisions have become final and felt by the parties in a concrete way.[260]

(b) Test. The question of ripeness turns on a two-fold inquiry: first, the court must evaluate the fitness of the issues for judicial decision, and second, the court must test the relative hardship to the parties of withholding court consideration.[261] The first part of the inquiry "requires consideration of a variety of pragmatic factors," including: whether the challenged agency's actions or inactions are "final"[262]; whether the issues presented for review are primarily legal, as opposed to factual, in nature; and whether administrative remedies have been exhausted, at least to the extent an adequate factual record has been established.[263] The second part of the test involves a determination of

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[258]Regional Rail Reorganization Act Cases, 419 U.S. 102, 138 (1974); United Public Workers v. Mitchell, 330 U.S. 75, 90-91 (1947); Meadows of Memphis v. City of W. Memphis, 800 F.2d 212, 214 (8th Cir. 1986); Automotive, Petroleum & Allied Indus. Emps. Union Local 618 v. Gelco Corp., 758 F.2d 1272, 1275 (8th Cir. 1985); Johnson v. Sikes, 730 F.2d 644, 647-48 (11th Cir. 1984).

[259]United States v. McKinley, 38 F.3d 428 (9th Cir. 1994); City of Houston v. HUD, 24 F.3d 1421 (D.C. Cir. 1994).

[260]Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967); Brown v. Ferro Corp., 763 F.2d 798, 801-02 (6th Cir. 1985), cert. denied, 474 U.S. 947 (1985); Eagle-Picher Indus., Inc. v. EPA, 759 F.2d 905, 912-13 (D.C. Cir. 1985).

[261]Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967). See also Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 201 (1983); Eagle-Picher Indus., Inc. v. EPA, 759 F.2d 905, 915 (D.C. Cir. 1985).

[262]See, e.g., Haines v. MSPB, 44 F.3d 998 (Fed. Cir. 1995) (letter from Clerk of MSPB was not a final order and Court of Appeals, therefore, lacked jurisdiction).

[263]Seafarers Internat'l Union v. United States Coast Guard, 736 F.2d 19, 26 (2d Cir. 1984). See also Herrington v. County of Sonoma, 834 F.2d 1488, 1495-96 (9th Cir. 1987), cert. denied, 489 U.S.

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whether the plaintiff will suffer immediate adverse consequences if review is withheld. This entails the evaluation of a number of considerations, such as the likelihood the challenged agency action will affect the plaintiff; the nature of the consequences risked by the plaintiff if affected by the challenged action; and whether the plaintiff has actually been forced to alter his conduct as a result of the action under attack.[264] "'This two-pronged inquiry in essence requires the court to balance its interest in deciding the issue in a more concrete setting against the hardship to the parties caused by the delay.'"[265]

(c) Examples. The issue of ripeness usually arises in cases involving pre-enforcement attacks on statutes or regulations. The plaintiff generally seeks to enjoin or declare invalid a law that arguably adversely affects his interests, but which the state has not yet sought to enforce against him.[266] Ripeness is also an issue when plaintiffs seek to enjoin ongoing, uncompleted

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1090 (1989); State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 479 (D.C. Cir. 1986), cert. denied, 480 U.S. 951 (1987); Eagle-Picher Indus., Inc. v. EPA, 759 F.2d 905, 915 (D.C. Cir. 1985).

[264]State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 480 (D.C. Cir. 1986); Wisconsin's Environmental Decade, Inc. v. State Bar of Wis., 747 F.2d 407, 411 (7th Cir. 1984), cert. denied, 471 U.S. 1100 (1985); Roshan v. Smith, 615 F. Supp. 901, 904-06 (D.D.C. 1985); International Union, UAW v. Facet Enterprises, Inc., 601 F. Supp. 292 (S.D. Mich. 1984).

[265]Andrade v. Lauer, 729 F.2d 1475, 1480 (D.C. Cir. 1984), quoting Webb v. Department of Health & Human Serv., 696 F.2d 101, 106 (D.C. Cir. 1982). Compare Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), with Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967).

[266]E.g., Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972) (Ohio loyalty oath); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) (FDA drug labelling regulation); Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967) (FDA cosmetic coloring regulation); Frozen Foods Express v. United States, 351 U.S. 40 (1956) (ICC interpretation of exemptions from certification requirement); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) (FCC broadcast station ownership regulation); Mountain States Telephone and Telegraph Company v. Federal Communications Commission, 939 F.2d 1035 (D.C. Cir.1991); Columbia Broadcasting Sys., Inc. v. United States, 316 U.S. 407 (1942) (FCC radio network regulations); Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987) (ICC constraints on rates on coal carriers); Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931 (D.C. Cir. 1986) (HHS regulations implementing Age Discrimination Act); Wisconsin's Environmental Decade, Inc. v. State Bar of Wis., 747 F.2d 407 (7th Cir. 1984), cert.

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administrative proceedings.[267] In the military context, questions of ripeness have also arisen when, without congressional authorization, the President threatens the use of military force.[268]

(3) Mootness.

(a) General. "Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies."[269] As a general proposition, a moot case is one in which "a justiciable controversy once existing between the parties is no longer at issue due to some change in circumstance after the case arose."[270] Simply put, a case is

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denied, 471 U.S. 1100 (1985); (unauthorized practice of law rules); Seafarers Internat'l Union v. United States Coast Guard, 736 F.2d 19 (2d Cir. 1984) (Coast Guard vessel manning and working conditions regulations). Cf. California Energy Resources Conservation & Dev. Comm'n. v. Johnson, 807 F.2d 1456 (9th Cir. 1986) (challenge to unexecuted contract provisions); State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474 (D.C. Cir. 1986) (challenge to potential recision of Department of Transportation passive restraint regulation); Middle South Energy, Inc. v. City of New Orleans, 800 F.2d 488 (5th Cir. 1986) (challenge to possible exercise of franchise option).

[267]E.g., Hastings v. Judicial Conf. of the United States, 770 F.2d 1093 (D.C. Cir. 1985) (investigation of judge's conduct), cert. denied, 477 U.S. 904 (1986); Andrade v. Lauer, 729 F.2d 1475 (D.C. Cir. 1984) (Department of Justice RIF); North v. Walsh, 656 F. Supp. 414 (D.D.C. 1987) (investigation of independent counsel appointed under Ethics in Government Act); Ticor Title Ins. Co. v. FTC, 625 F. Supp. 747 (D.D.C. 1986) (FTC proceedings), aff'd, 814 F.2d 731 (1987); Watkins v. United States Army, No. C-81-1065R (W.D. Wash. Oct. 23, 1981) (separation for homosexuality).

[268]E.g., Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990); Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) (challenges to military buildup in Persian Gulf as part of Operation Desert Shield).

[269]Iron Arrow Honor Society v. Heckler, 464 U.S. 67 (1983); Church of Scientology of California v. United States, 506 U.S. 9 (1992) (a federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before). See also DeFunis v. Odegaard, 416 U.S. 312, 316 (1974).

[270]Kates & Barker, Mootness in Judicial Proceedings: Toward a Coherent Theory, 62 Calif. L. Rev. 1385, 1387 (1974). See also UAW Local 1369 v. Telex Computer Products, Inc., 816 F.2d 519, 521 (10th Cir. 1987) ("Mootness is jurisdictional").

moot when its underlying issues have been resolved in one way or another; no case or controversy exists once the issues in a lawsuit have been settled.[271]

(b) Test. "[M]ootness has two aspects: 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome."'[272] A moot case meets two criteria: first, "it can be said with assurance that 'there is no reasonable expectation . . . 'that the alleged violation will recur, . . . and [second] interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'"[273] "When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.'"[274]

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[271]See United States Dep't. of Justice v. Provenzano, 469 U.S. 14 (1984); Lewis v. Continental Bank Corp., 494 U.S. 472 (1990) (when, during the pendency of an appeal, events occur that would prevent the appellate court from fashioning effective relief, the appeal should be dismissed as moot).

[272]United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980), quoting Powell v. McCormick, 395 U.S. 486, 496 (1969). See also Murphy v. Hunt, 455 U.S. 478, 481 (1982); Monaghan, supra note 248, at 1384.

[273]County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979), quoting United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953). See also Ethredge v. Hail, 996 F.2d 1173 (11th Cir. 1993); Martinez v. Wilson, 32 F.3d 1415 (9th Cir. 1994); AFL-CIO v. Rockwell Int'l Corp., 7 F.3d 1487 (10th Cir. 1993); Moseanko v. Yeutter, 944 F.2d 418 (8th Cir. 1991); Save the Bay Inc. v. United States Army, 639 F.2d 1100 (5th Cir. 1981).

[274]County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). An action is moot if the court can no longer grant effective relief. Fox v. Board of Trustees of State University of New York, 42 F.3d 135 (2d Cir. 1994), cert. denied, 114 S. Ct. 2634 (1995); Roth v. United States, 952 F.2d 611 (1st Cir. 1991); Wilson v. United States, Dep't of Interior, 799 F.2d 591, 592 (9th Cir. 1986). Conversely, a claim is not moot if any claim for relief remains alive. In the Matter of Commonwealth Oil Refining Co., 805 F.2d 1175, 1181 (5th Cir. 1986), cert. denied, 483 U.S. 1005 (1987).

An example of a moot case in the military context is Ringgold v. United States:

RINGGOLD v. UNITED STATES
553 F.2d 309 (2d Cir. 1977)

Before SMITH and FEINBERG, Circuit Judges, and TENNEY, District Judge.

PER CURIAM:

In early June 1976, Cadet Timothy D. Ringgold filed suit in the United States District Court for the Southern District of New York against the United States of America and officials of the Department of the Army and the United States Military Academy, seeking to prevent defendants from applying the Academy's Cadet Honor Code to him and others similarly situated. After denying preliminary motions by Ringgold, Judge Richard Owen in September 1976 granted summary judgment for defendants. On appeal, Ringgold presses in this court several constitutional challenges to the Honor Code, but we have not considered them because the appeal is moot.

In April 1976, at a meeting with the Undersecretary of the Army, Ringgold had asserted that there were many instances of cheating at the Academy. Word of this disclosure reached the Cadet Honor Committee, which eventually concluded that Ringgold had violated the Honor Code prohibition on "toleration" of the offenses of others. On August 17, 1976, before Ringgold's case was submitted to the Board of Officers under the Army's procedural regulations, Ringgold voluntarily resigned from the Academy, effective September 1, 1976.

Ringgold's resignation moots this appeal. Although the suit was filed as a class action, Judge Owen never certified the class so we have only the claim of Ringgold before us. The Article III limitation of federal jurisdiction to "Cases" and "Controversies" has been interpreted to mean that we are "without the power to decide questions that cannot affect the rights of litigants in the case" before us. North Carolina v. Rice, 404 U.S. 244, 246, 92 S. Ct. 402, 404, 30 L.Ed.2d 413 (1971). When he resigned voluntarily, after filing suit and while the district judge was considering the case on the merits, Ringgold removed himself from the Honor Code's purview. Thus, a decision on the validity of the Code or its application would not now affect him. This case does not fall within the exception to the mootness doctrine for disputes that are "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S. Ct. 279, 283, 55 L.Ed. 310 (1911). Ringgold's own action, not the nature of his claim or the alleged wrong, has frustrated his quest for review. And although Ringgold has applied to the Academy for readmission, we cannot assume that

> he will be readmitted, again violate the Honor Code and be prosecuted once more. Moreover, nothing prevents another cadet from raising the same general attack on the Honor Code or the procedures for administering it.
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> Appeal dismissed as moot, with instructions to the district court to vacate the judgment on the ground of mootness.[275]

(c) Doctrine Applicable Throughout the Proceedings. That a controversy may have been "live" at the time the lawsuit was commenced does not preclude operation of the doctrine of mootness. "The controversy must exist at every stage of the proceeding, including the appellate stage."[276]

(d) Exceptions. The federal courts have created a number of exceptions to the mootness doctrine:

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[275] See also Sandidge v. State of Wash., 813 F.2d 1025 (9th Cir. 1987) (challenge to OER mooted by separation from military service); De Arellano v. Weinberger, 788 F.2d 762 (D.C. Cir. 1986) (en banc) (suit to enjoin US from operating Military Training Center on plaintiffs' land in Honduras mooted by the withdrawal of the troops); James Luterbach Constr. Co. v. Adamkus, 781 F.2d 599 (7th Cir. 1986) (suit to enjoin contract award moot after contract completed); Gulf Oil Corp. v. Brock, 778 F.2d 834 (D.C. Cir. 1985) (suit to enjoin disclosure under FOIA moot after request withdrawn); Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985) (suit to enjoin Grenada invasion moot after invasion terminated); Save the Bay, Inc. v. United States Army, 639 F.2d 1100 (5th Cir. 1981) (suit to enjoin construction of railroad moot after railroad completed); Quinn v. Brown, 561 F.2d 795 (9th Cir. 1977) (suit to enjoin transfer moot after orders revoked).

[276] Oakville Development Corp. v. F.D.I.C., 986 F.2d 611 (1st Cir. 1993); Jefferson v. Abrams, 747 F.2d 94, 96 (2d Cir. 1984). See also Sosna v. Iowa, 419 U.S. 393, 398 (1975); Golden v. Zwickler, 394 U.S. 103, 108 (1969); Mills v. Green, 159 U.S. 651, 653 (1895); Railway Labor Executives Ass'n v. Chesapeake W. Ry., 915 F.2d 116, 118 (4th Cir. 1990), cert. denied, 499 U.S. 921 (1991); Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater, 777 F.2d 598, 605 n.19 (11th Cir. 1985), cert. denied, 476 U.S. 1116 (1986); New Jersey Turnpike Auth. v. Jersey Central Power & Light, 772 F.2d 25, 30-31 (3d Cir. 1985); Matthews v. Marsh, 755 F.2d 182 (1st Cir. 1985).

(i) "Capable of Repetition, Yet Evading Review." A case is not moot if the underlying controversy is one that is "capable of repetition, yet evading review."[277] When a case falls within this exception, two elements are combined: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."[278] For example, in Roe v. Wade,[279] the Supreme Court's famous abortion decision, the Court was faced with the argument that the controversy was moot because the plaintiff's pregnancy had been terminated naturally through the birth of her child. The Court rejected the argument, stating:

> But, when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

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[277]Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

[278]Weinstein v. Bradford, 423 U.S. 147, 149 (1975). See also Murphy v. Hunt, 455 U.S. 478, 482 (1982); Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 187 (1979); SEC v. Sloan, 436 U.S. 103, 109 (1978); First Nat'l Bank v. Bellotti, 435 U.S. 765, 774 (1978); Super Tire Eng'r Co. v. McCorkle, 416 U.S. 115, 122 (1974); Moore v. Ogilvie, 394 U.S. 814, 816 (1969); cf. Bunker Limited Partnership v. United States, 820 F.2d 308, 312 (9th Cir. 1987) (case not necessarily moot where new statute in pertinent part is manifestly unchanged from old statute because the injustice caused by the old statute is capable of repetition); Northwest Resource Information Center Inc. v. National Marine Fisheries Service, 58 F.3d 1060 (9th Cir. 1995) (although challenged permit now expired, successive permit would allow opportunity for challenge).

[279]410 U.S. 113 (1973).

By way of contrast is DeFunis v. Odegaard,[280] in which the plaintiff sued the University of Washington Law School claiming that he was denied admission because of race. The trial court issued a mandatory injunction ordering the plaintiff's admission into the school. By the time the case reached the Supreme Court, the plaintiff was in the final quarter of his third year of law school. The Supreme Court held that the "capable of repetition, yet evading review" exception to the mootness doctrine was inapplicable since the plaintiff "will never again be required to run the gauntlet of the law school's admission process, and so the question is certainly not 'capable of repetition' so far as he is concerned."[281] An example of this exception arising in a military case is Flynt v. Weinberger, which involved the prohibition of press coverage of the initial stages of United States military intervention in Grenada:

FLYNT v. WEINBERGER
588 F. Supp. 57 (D.D.C. 1984),
aff'd, 762 F.2d 134 (D.C. Cir. 1985)

MEMORANDUM

GASCH, District Judge.

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[280]416 U.S. 312 (1974).

[281]Id. at 319. See also City of Houston v. HUD, 24 F.3d 1421 (D.C. Cir. 1994); Ethredge v. Hail, 996 F.2d 1173 (11th Cir. 1993); Nomi v. Regents for the University of Minnesota, 5 F.3d 332 8th Cir. 1993); McFarlin v. Newport Special School District, 980 F.2d 1208 (8th Cir. 1992); Westmoreland v. National Transp. Safety Bd., 833 F.2d 1461, 1463 (11th Cir. 1987); Thompson v. United States Dep't of Labor, 813 F.2d 48, 51 (3d Cir. 1987); Leonard v. Hammond, 804 F.2d 838, 842-43 (4th Cir. 1986); Campesinos Unidos, Inc. v. United States Dep't of Labor, 803 F.2d 1063, 1068 (9th Cir. 1986); Ameron, Inc. v. United States Army Corps of Eng'rs, 787 F.2d 875 (3d Cir. 1986); Conyers v. Reagan, 765 F.2d 1124, 1128-29 (D.C. Cir. 1985); Dash v. Commanding General, 307 F. Supp. 849 (D.S.C. 1969), aff'd, 429 F.2d 427 (4th Cir.), cert. denied, 401 U.S. 981 (1970). But cf. Christian Knights of the Ku Klux Klan Invisible Empire Inc. v. District of Columbia, 972 F.2d 365 (D.C. Cir. 1992); Doe v. Sullivan, 938 F.2d 1370 (D.C. Cir. 1991); Cox v. McCarthy, 829 F.2d 800, 804 (9th Cir. 1987) (a law creating an inability to satisfy "same-plaintiff test" calls capability of repetition analysis into question by stripping a class of any federal judicial remedy).

In this case plaintiffs are challenging the decision to prohibit press coverage of the initial stages of the United States' military intervention in Grenada. Defendants have moved the Court to dismiss this challenge as moot. For the reasons discussed below, this motion is granted.

On October 25, 1983 the United States began a military intervention on the island nation of Grenada. The purpose of this military action according to the Reagan administration was "to protect U.S. and foreign citizens in Grenada and to assist in stabilizing the situation in [that] country." It is undisputed that representatives of the press were prohibited from accompanying the invasion forces in the initial landings on the island and that members of the press who attempted to make their own way to the island were prevented from reporting news of the invasion. In short, in its initial stages, a total news blackout of the military action was imposed and the only information available to the public about the events occurring on Grenada was issued by official United States government sources.

Beginning on October 27, 1983, the press ban was lifted and a limited number of press representatives were transported by military aircraft to Grenada. When Grenada's civilian airport reopened on November 7, 1983, all restrictions on travel to the island were eliminated and, consequently, members of the press had unlimited access to it. This remains the situation today.

The United States' military intervention on Grenada is now over. At the present time only a small detachment of 300 United States military personnel remain on the island. This United States military presence, consists of military police, logistics, engineering, medical and other support personnel. More importantly, the press now has unlimited freedom to report about events in Grenada, including those involving the United States' military presence there.

Plaintiffs' complaint in this action seeks only declaratory and injunctive relief. They seek an injunction prohibiting defendants from "preventing or otherwise hindering Plaintiffs from sending reporters to the sovereign nation of Grenada to gather news . . ." and they seek a declaration that "the course of conduct engaged in by Defendants, . . . in preventing Plaintiffs, or otherwise hindering Plaintiffs', efforts to send reporters to the sovereign nation of Grenada for the purpose of gathering news is in violation of the Constitution [sic] laws, and treaties of the United States. . . ."

On its face, plaintiffs' claim for injunctive relief appears to be moot. There is no relief the Court can give plaintiffs that they do not already enjoy. At least since November 7, 1983, plaintiffs have had unlimited access to Grenada and there is no evidence that defendants have engaged in any acts since that time designed to "[prevent] or otherwise [hinder] Plaintiffs from sending reporters to . . . Grenada." Nor is there

any real possibility that defendants will engage in such acts in the future because the military action that precipitated the temporary press ban on Grenada is long since over.

The Supreme Court has stated that

> [I]n general a case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."

Murphy v. Hunt, 455 U.S. 478, 481, 102 S. Ct. 1181, 1182-1183, 71 L.Ed.2d 353 (1982), quoting United States Parole Commission v. Geraghty, 445 U.S. 388, 390, 100 S. Ct. 1202, 1205, 63 L.Ed.2d 479 (1980). Limited exceptions to this general rule have been recognized where (i) the controversy is one that is "capable of repetition, yet evading review," Weinstein v. Bradford, 423 U.S. 147, 148, 96 S. Ct. 347, 348, 46 L.Ed.2d 350 (1975), or (ii) the defendant has voluntarily ceased the challenged activity, United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S. Ct. 894, 897, 97 L.Ed. 1303 (1953).

This case falls outside the first exception. The "capable of repetition, yet evading review doctrine" is limited to the situation where:

(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and
(2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.

Murphy v. Hunt, 455 U.S. at 482, 102 S. Ct. at 1183, quoting Weinstein v. Bradford, 423 U.S. at 149, 96 S. Ct. at 348. Although the activity challenged by plaintiffs did "not last long enough for complete judicial review" of the controversy it created, Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 126, 94 S. Ct. 1694, 1700, 40 L.Ed.2d 1 (1974), there is no "reasonable expectation" that the controversy will recur. The Supreme Court has required not merely a "physical or theoretical possibility," Murphy v. Hunt, 455 U.S. at 482, 102 S. Ct. at 1183, but a "demonstrated probability" that it will recur. Weinstein v. Bradford, 423 U.S. at 149, 96 S. Ct. at 348. No such probability exists in this case.

The invasion of Grenada was, like any invasion or military intervention, a unique event. Its occurrence required a combination of geopolitical circumstances not likely to be repeated. In addition, it required a discretionary decision by the President of the United States as Commander-in-Chief to commit United States forces. The decision to impose a temporary press ban was also a discretionary one. It was made by the military commander in the field of operations because the safety of press representatives

could not be guaranteed and in order to ensure that secrecy was maintained, thereby protecting the safety of United States troops and promoting the success of the military operation. As the supplemental papers submitted by the parties at the Court's request demonstrate, a press ban has not often been resorted to in military actions involving United States troops. In fact, this is apparently the first time that a decision to impose one has been objected to, or at least the first time that these plaintiffs have objected to such a decision. Given the discretionary nature of the decision to impose a press ban and the infrequency with which such a decision has been implemented, the Court is unable to detect a "demonstrated probability" that a press ban to which plaintiffs will object will be imposed in the foreseeable future.[282]

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(ii) Voluntary Cessation. A case is not made moot simply because the defendant voluntarily ceases his putatively unlawful conduct.[283] Unless "the defendant can demonstrate 'there is no reasonable expectation that the wrong will be repeated,'" the case is not moot.[284] Otherwise, "[t]he defendant is free to return to his old ways" once the lawsuit is dismissed.[285] The voluntary cessation issue arose in the case of Berlin Democratic Club v. Rumsfeld:

BERLIN DEMOCRATIC CLUB v. RUMSFELD
410 F. Supp. 144 (D.D.C. 1976)

MEMORANDUM AND ORDER, WILLIAM B. JONES, Chief Judge.

INTRODUCTION

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[282]See also Nation Magazine v. Department of Defense, 762 F. Supp. 1558 (S.D.N.Y. 1991) (dismissing as moot first amendment challenges to press restrictions during Operation Desert Storm).

[283]United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 304-10 (1897).

[284] United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953), quoting United States v. Aluminum Co. of America, 148 F.2d 416, 448 (2d Cir. 1945); Oregon Natural Resources Council, Inc. v. Grossarth, 979 F.2d 1377 (9th Cir. 1992).

[285]United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953). See also Thompson v. United States Dep't of Labor, 813 F.2d 48, 51 (3d Cir. 1987); Dial v. Coler, 791 F.2d 78, 81 (7th Cir. 1986); Olagues v. Russoniello, 770 F.2d 791, 795 (9th Cir. 1985); Community for Creative Non-Violence v. Hess, 745 F.2d 697, 700 (D.C. Cir. 1984).

This is an action by a number of American citizens and organizations and one Austrian citizen, residing in West Berlin or the Federal Republic of Germany [FRG], who challenge certain of the United States Army's intelligence activities. The plaintiffs are the Berlin Democratic Club [BDC], which among other activities supported Senator McGovern for president in 1972 and the impeachment proceedings against former President Nixon in 1973; the Lawyers Military Defense Committee [LMDC] which operates as a legal aid service for members of the armed forces overseas; present and former members of the BDC; attorneys and consultants to the LMDC; American writers and journalists; an Austrian journalist who has acted as consultant to the LMDC; and two American ministers formerly residing at Gossner Mission in Mainz, West Germany. The defendants are myriad Department of Defense Army officials and uniformed personnel allegedly responsible for or instrumental in conducting the intelligence program as it has been carried out in West Berlin and in the Federal Republic of Germany.

Plaintiffs allege numerous acts of warrantless electronic surveillance; covert infiltration of BDC meetings; covert infiltration of the Gossner Mission for the purpose of disrupting the Mission's counseling activities and provoking Mission personnel to commit illegal acts; covert infiltration of English language journals, for which several plaintiffs work, for the purpose of disrupting their journalistic activities and provoking the journalists to commit illegal acts; deliberate disruption of the counseling activities of the Austrian journalist; maintenance of "dissidence identification" files and "blacklists"; dissemination of these files to military and civilian agencies and private citizens, resulting in the dismissal of two plaintiffs from jobs at the United States exhibit at the German Industrial Fair, termination of two jobs held by another plaintiff at the British supply depot in West Berlin and with a private landscaping firm in West Berlin, debarment of another plaintiff from access to all United States military installations in Berlin, institution of deportation proceedings against another plaintiff by the German authorities, the inability of several other plaintiffs to obtain security clearances for jobs they were seeking, damage to the professional reputations of the LMDC, its lawyers, the American journalists and illegal opening of plaintiffs' mail either by American authorities or by German authorities at the inducement of defendants. Plaintiffs claim that these activities as alleged violate their first, fourth, sixth and ninth amendment rights as well as their statutory rights. They seek injunctive, declaratory, and monetary relief for violation of their statutory and constitutional rights.

. . . .

MOOTNESS

Defendants also argue that AR 381-17 and AR 380-13, promulgated in September 1974, have mooted any claim plaintiffs might otherwise have for injunctive relief. Neither regulation, however, can provide a basis for denial of injunctive relief.

First, AR 381-17, as will be discussed in the next section, does not and never has provided for prior judicial authorization of wiretaps, which plaintiffs contend the fourth amendment requires. Thus, plaintiffs' fourth amendment claims for injunctive relief are not mooted.

Nor does AR 380-13 as amended moot the remainder of plaintiffs' claims for injunctive relief. As noted earlier, the allegations of abusive dissemination of information, illegal disruption of activities, etc., not permitted by AR 380-13, present a justiciable controversy under the first amendment. Defendants contend they "are confident" that abusive surveillance techniques and dissemination of information as alleged by plaintiffs will not be repeated. Moreover, they assert by affidavit that no investigations of non-DOD-affiliated citizens are presently being conducted. Def. Exhibit 36-F. Plaintiffs should be granted discovery to contravene these assertions, which are clearly contrary to the allegations in plaintiffs' complaint, factually suspect in light of the earlier admitted misrepresentations to the Court, and in fact questioned by at least one Army action undertaken since promulgation of revised AR 380-13. Moreover, the pattern of action alleged in the complaint alone is sufficient to reject defendant's mootness argument. As the Court of Appeals noted in Watkins v. Washington, 472 F.2d 1373 (1972), when faced with a comparable argument in a racial discrimination case:

> Where pervasive racial discrimination is demonstrated, the court has not only the power, but also the duty, to render a decree eliminating the effects of past discrimination and ensuring equal opportunity in the future. Louisiana v. United States, 380 U.S. 145 (1965). That there is a new Director of the Housing Division who has taken steps to ensure equal employment opportunity does not justify denying affirmative equitable relief. The period of nondiscrimination since 1968 is very brief compared to the long record of discrimination demonstrated in this case, and even if the new supervisors are entirely in good faith the task of eliminating ingrained discriminatory practices is a difficult one deserving of active judicial support. [cites omitted]

153 U.S. App. D.C. 298, 472 F.2d at 1376. Defendants' argument must

therefore be rejected.[286]

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(iii) Collateral Consequences. A case is not moot where, even though terminated and not likely to recur, the Government's putatively illegal conduct leaves lasting adverse consequences.[287] The collateral consequences exception to mootness is illustrated in the following case:

CONNELL v. SHOEMAKER
555 F.2d 483 (5th Cir. 1977)

[The Commanding General, Fort Hood, placed off-limits apartments owned by the plaintiff, Ted C. Connell, because of racial discrimination. The plaintiff brought suit seeking declaratory and injunctive relief from the off-limits sanction. After suit was filed, but before the district court decided the case, the sanction was lifted. The district court subsequently dismissed the action as moot. The plaintiff appealed.]

Mootness

The sole issue on appeal is whether the court below properly dismissed this action as moot. While appellants' claim for injunctive relief concededly was rendered moot by the Army's lifting of the rental prohibition, appellants dispute the mootness of their claim for declaratory judgment. Since it is possible for a "live" controversy to remain where some but not all issues in a case have become moot, Powell v.

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[286]Compare Iron Arrow Honor Society v. Heckler, 464 U.S. 67 (1983) (action of third party terminates unlawful conduct); DeFunis v. Odegaard, 416 U.S. 312 (1974) (defendant not free to return to challenged behavior); Boston Teachers Union v. Edgar, 787 F.2d 12 (1st Cir. 1986) (challenge to anti-strike statute mooted when plaintiff-union voted not to strike); Gulf Oil Corp. v. Brock, 778 F.2d 834 (D.C. Cir. 1985) (challenge to FOIA disclosure moot after nonparty requestor withdrew FOIA request); Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater, 777 F.2d 598, 605 (11th Cir. 1985), cert. denied, 476 U.S. 1116 (1986) (permanent repeal of challenged ordinance and replacement by new ordinance moots challenge). See also Flake v. Bennett, 611 F. Supp. 70 (D.D.C. 1985) (voluntary cessation of putatively unlawful personnel policy does not moot challenge to policy).

[287]Pennsylvania v. Mimms, 434 U.S. 106, 108 n.3 (1977); Sibron v. New York, 392 U.S. 40, 53-54 (1968). See also Kisser v. Cisneros, 14 F.3d 615 (D.C. Cir. 1994); Leonard v. Hammond, 804 F.2d 838, 842 (4th Cir. 1986).

McCormack, 395 U.S. 486, 497, 89 S. Ct. 1944, 23 L.Ed.2d 491 (1969), the question of the mootness vel non of appellants' claim under the Declaratory Judgment Act, 28 U.S.C. § 2201, becomes "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issue of a declaratory judgment." Maryland Cas. Co. v. Pacific Coal & Oil Co., 321 U.S. 270, 273, 61 S. Ct. 510, 512, 85 L.Ed. 826 (1941). We hold that such a controversy exists in the present case.

While appellants attack the district court's finding of mootness on various bases, we view the continuing practical consequences of the Army's determination of discrimination as sufficient to negate mootness. Appellants have interests in various businesses engaged in retail sales of goods and services directly to the public in the area adjacent to Fort Hood. Since a favorable public image is vital to the success of such enterprises, the imputation of bigotry implicit in the Army's widely publicized sanctions against appellants could not but harm their reputations and, concomitantly, their livelihoods with clientele both black and white. Additionally, appellant Ted Connell has held various local civic and elective political positions; whatever such aspirations he might yet harbor have almost certainly been undercut by the same stigma. In holding that an attorney's challenge to his conviction for criminal contempt was not rendered moot by completion of his sentence, this Court assessed the collateral consequences of the conviction and, in addition to its legal consequences, gave considerable weight to the possibility of harm to the attorney's practice of law as well as to his "[o]pportunities for appointment to the bench or to other high office." United States v. Schrimsher (In re Butts), 493 F.2d 842, 844 (5th Cir. 1974). Although the present case does not involve a criminal conviction, we view the collateral consequences in the two cases as analogous.

. . . .

Accordingly, we reverse and remand to the district court for its consideration of the merits of appellants' claim for declaratory judgment.

REVERSED and REMANDED.[288]

[288] See also Larche v. Simons, 53 F.3d 1068 (9th Cir. 1995) (habeas petition not moot even after completion of sentence where petitioner would suffer collateral legal consequences if conviction allowed to stand); McAiley v. Birdsong, 451 F.2d 1244 (6th Cir. 1971) (suit contesting denial of conscientious objector discharge not mooted by subsequent undesirable discharge).

(iv) Class Actions. Finally, where a court certifies a case as a class action, the action is not rendered moot simply because the issues have been resolved with respect to the named plaintiffs.[289] Moreover, a trial court's denial of a motion for class certification may be reviewed on appeal after the named plaintiffs' personal claims have become "moot."[290] If the appeal results in reversal of the class certification denial, and a class subsequently is properly certified, the merits of the class claim may then be adjudicated. . . ."[291] An action may no longer be live, however, when the claims of the named plaintiffs as well as those of a large part of the class have become moot.[292]

(4) Standing.

(a) General.

(i) Of all the justiciability doctrines, the requirement that a litigant have standing to invoke the power of the federal courts is perhaps most important.[293] The doctrine of

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[289]Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Sosna v. Iowa, 419 U.S. 393 (1975).

[290]United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980); Reed v. Heckler, 756 F.2d 779, 785-87 (10th Cir. 1985).

[291]United States Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980). Compare Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128 (1975) (case mooted before class certification properly pursued). Two important corollaries parallel the rule that a plaintiff with a mooted claim may appeal a denial of class certification. First, a plaintiff may not immediately appeal a denial of class certification. Such a denial is not an appealable interlocutory order; consequently, the plaintiff must wait until after final judgment before lodging an appeal. Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978); Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); Shanks v. City of Dallas, 752 F.2d 1092 (5th Cir. 1985). Second, courts will permit class members to intervene to appeal the denial of class certification after the named plaintiff's claim has become moot. United Airlines, Inc. v. McDonald, 432 U.S. 385 (1978).

[292]Kremens v. Bartley, 431 U.S. 119 (1977).

[293]Allen v. Wright, 468 U.S. 737, 750 (1984).

standing delimits the persons permitted to bring a lawsuit in the federal courts.[294] "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."[295] In other words, "[s]tanding analysis . . . does not determine whether the claim is justiciable; instead, it resolves whether the 'proper' party has raised that claim."[296]

(ii) As a general rule, standing requires that a person challenging a governmental action have been directly and personally injured by the action challenged, and that the injuries suffered be redressable by a federal court. The standing doctrine subsumes both constitutional and prudential concerns, both of which will be discussed in greater detail below.

(b) Purposes of Standing. The standing doctrine serves two fundamental purposes:

(i) First, the standing requirement ensures that the parties to a case "will provide the court with the fact-presentation and issue-definition capabilities it lacks." "The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult

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[294]See Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931, 940 (D.C. Cir. 1986); Sierra Club v. SCM Corp., 747 F.2d 99, 103 (2d Cir. 1984).

[295]Flast v. Cohen, 392 U.S. 83, 99 (1968).

[296]Comment, The Generalized Grievance Restriction: Prudential Restraint or Constitutional Mandate?, 70 Geo. L.J. 1157, 1162 (1982) [hereinafter Comment, The Generalized Grievance Restriction]. See also Flast v. Cohen, 392 U.S. 83, 99-100; Fulani v. Bentsen, 35 F.3d 49 (2d Cir. 1994); American Legal Found. v. FCC, 808 F.2d 84, 88 (D.C. Cir. 1987); McKinney v. United States Dep't of the Treasury, 799 F.2d 1544, 1549 (Fed. Cir. 1986); In the Matter of Appointment of Independent Counsel, 766 F.2d 70, 73 (2d Cir.), cert. denied, 474 U.S. 1020 (1985) ("Standing asks whether a particular litigant is entitled to invoke the power of the federal court").

constitutional questions."[297] In Schlesinger v. Reservists Comm. to Stop the War,[298] the Supreme Court explained the importance of the "fact-presentation, issue definition" ensured by the standing doctrine:

> Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. It adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful. This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance. Such authoritative presentations are an integral part of the judicial process, for a court must rely on the parties' treatment of the facts and claims before it to develop its rules of law.[10] Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions.
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> [10] This is in sharp contrast to the political processes in which the Congress can initiate inquiry and action, define issues and objectives, and exercise virtually unlimited power by way of hearings and reports, thus making a record for plenary consideration and solutions. The legislative function is inherently general rather than particular and is not intended to be responsive to adversaries asserting specific claims or interests peculiar to themselves.

(ii) Second, and more importantly, standing serves the "idea of separation of powers."[299] The doctrine of standing "is founded in concern about the proper--and properly

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[297]Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 72 (1978), quoting Baker v. Carr, 369 U.S. 186, 204 (1962). See also Flast v. Cohen, 392 U.S. 83, 101 ("the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution").

[298]418 U.S. 208, 220-21 (1974).

[299]Wyoming v. Oklahoma, 502 U.S. 437 (1992); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Allen v. Wright, 468 U.S. 737, 752 (1984). See also Scalia, The Doctrine of Standing As an Essential Element of the Separation of Powers, 17 Suffolk U.L. Rev. 881, 888 (1983).

limited--role of the courts in a democratic society."[300] "A federal court cannot ignore [the standing requirement] without overstepping its assigned role in our system of adjudicating only actual cases and controversies."[301] The Supreme Court discussed the significance played by the doctrine of standing in preserving the separation of powers in United States v. Richardson.[302] Richardson involved a challenge to provisions of the Central Intelligence Agency Act, which allegedly violated the accounting clause of the Constitution.[303] The plaintiff contended that the CIA budget was not published in accordance with the accounting clause, and as a consequence, he could not obtain a document setting out the expenditures and receipts of the CIA. The Court held the plaintiff lacked standing because his putative injury was not direct and personal. In essence, the plaintiff's purported injury was common to all other members of the American public. Thus, to hold that the plaintiff had standing would infringe upon the prerogatives of the political branches of the Government:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a representative Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress for

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[300]Warth v. Seldin, 422 U.S. 490, 498 (1975).

[301]Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 39 (1976). See also Wyoming v. Oklahoma, 502 U.S. 437 (1992).

[302]418 U.S. 166 (1974).

[303]U.S. Const. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in consequence of appropriation made by law; and a regular Statement and Account of the Receipts and Expenditures of all public money shall be published from time to time").

> reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.[304]

(c) Constitutional Standing Requirements. As indicated above, the doctrine of standing includes both constitutional requirements and prudential considerations. To satisfy the constitutional standing requirement, a plaintiff must show three things: (1) a distinct and palpable injury; (2) a causal connection between the injury and the defendant's conduct; and (3) a substantial likelihood that the relief requested will redress the injury. Recently, the Supreme Court stated the constitutional elements of standing as follows:

> [T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?[305]

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[304]United States v. Richardson, 418 U.S. 166, 179 (1974). See also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472-73 (1982) ("the 'case and controversies' language of Art. III forecloses the conversion of the courts of the United States into judicial versions of college debating forums"); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221-22 (1974) ("to permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction'").

[305]Allen v. Wright, 468 U.S. 737, 752 (1984). See also County of Riverside v. McLaughlin, 500 U.S. 44 (1991); Animal Legal Defense Fund v. Espy, 29 F.3d 720 (D.C. Cir. 1994); Vote Choice, Inc. v. DiStefano, 4 F.3d 26 (1st Cir. 1993); Naturist Society v. Fillyaw, 958 F.2d 1515 (11th Cir. 1992); Haitian Refugee Center v. Gracey, 809 F.2d 794, 798-99 (D.C. Cir. 1987). See generally Nichol, Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint, 69 Ky. L. Rev. 185, 191-92 (1980-81).

The constitutional prerequisites of standing are jurisdictional in nature and cannot be waived.[306]

(i) Injury.

(A) To establish standing, a plaintiff first must establish that he in fact has suffered some injury.[307] The plaintiff must allege that he has sustained or is immediately in danger of sustaining a distinct and palpable injury.[308] "The injury or threat of injury must be both 'real and immediate,' not 'conjectural or hypothetical.'"[309] An "[a]bstract injury is not enough."[310] Nor is a mere assertion of a right to have the government act in accordance with law sufficient to satisfy the injury requirement.[311]

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[306]National Organization for Women v. Scheidler, 510 U.S. 249 (1994); Bender v. Williamsport Area School Dist., 475 U.S. 534, 541-42 (1986).

[307]Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972).

[308]E.g., Allen v. Wright, 468 U.S. 737, 751 (1984); Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979); Warth v. Seldin, 422 U.S. 490, 501 (1975); Animal Legal Defense Fund v. Espy, 29 F.3d 720 (D.C. Cir. 1994); Freedom Republicans, Inc. v. Federal Election Commission, 13 F.3d 412 (D.C. Cir. 1994); Massachusetts Association of Afro-American Police, Inc. v. Boston Police Department, 973 F.2d 18 (1st Cir. 1992); Kurtz v. Baker, 829 F.2d 1133, 1141-42 (D.C. Cir. 1987), cert. denied, 486 U.S. 1059 (1988); American Civil Liberties Union v. City of St. Charles, 794 F.2d 265, 268 (7th Cir. 1986), cert. denied, 479 U.S. 961 (1986); George v. State of Texas, 788 F.2d 1099, 1100 (5th Cir.), cert. denied, 479 U.S. 866 (1986); Doe v. Duling, 782 F.2d 1202, 1205-06 (4th Cir. 1986).

[309]O'Shea v. Littleton, 414 U.S. 488, 494 (1974). See also Franklin v. Massachusetts, 505 U.S. 788 (1992); Los Angeles v. Lyons, 461 U.S. 95, 102 (1983).

[310]Id.; International Primate Protection League v. Institute for Behavioral Research, Inc., 799 F.2d 934 (4th Cir. 1986), cert. denied, 481 U.S. 1004 (1987).

[311]Allen v. Wright, 468 U.S. 737, 754 (1984). Cf. Diamond v. Charles, 476 U.S. 54, 66-67 (1986) ("Article III requires more than a desire to vindicate value interest"). See also Cronson v. Clark, 810 F.2d 662, 664 (7th Cir. 1987), cert. denied, 484 U.S. 871 (1987); American Legal Found. v. FCC, 808 F.2d 84, 91-92 (D.C. Cir. 1987); McKinney v. United States Dept. of the Treasury, 799 F.2d

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(B) To appreciate the injury requirement of standing, compare Laird v. Tatum and Berlin Democratic Club v. Rumsfeld, both arising out of the conduct of Army intelligence activities:

LAIRD v. TATUM
408 U.S. 1 (1973)

MR. CHIEF JUSTICE BURGER delivered the opinion of the court.

> Respondents brought this class action in the District Court seeking declaratory and injunctive relief on their claim that their rights were being invaded by the Department of the Army's alleged "surveillance of lawful and peaceful civilian political activity." The petitioners in response described the activity as "gathering by lawful means . . . [and] maintaining and using in their intelligence activities . . . information relating to potential or actual civil disturbances [or] street demonstrations." In connection with respondents' motion for a preliminary injunction and petitioners' motion to dismiss the complaint, both parties filed a number of affidavits with the District Court and presented their oral arguments at a hearing on the two motions. On the basis of the pleadings, the affidavits before the court and the oral arguments advanced at the hearing, the District Court granted petitioners' motion to dismiss, holding that there was no justiciable claim for relief.
>
> On appeal, a divided Court of Appeals reversed and ordered the case remanded for further proceedings. We granted certiorari to consider whether, as the Court of Appeals held, respondents presented a justiciable controversy in complaining of a "chilling" effect on the exercise of their First Amendment rights where such effect is allegedly caused, not by any "specific action of the Army against them, [but] only [by] the existence and operation of the intelligence gathering and distributing system, which is confined to the Army and related civilian investigative agencies." 144 U.S. App. D.C. 72, 78, 444 F.2d 947, 953. We reverse.

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(..continued)
1544 (Fed. Cir. 1986). Cf. Fernandez v. Beock, 840 F.2d 622, 630 (9th Cir. 1988) (statutory language, statutory purpose, and legislative history may indicate that a statutory duty creates a correlative procedural right, the invasion of which is injury-in-fact); see also Younger v. Turnage, 677 F. Supp. 16, 20 (D.D.C. 1988).

There is in the record a considerable amount of background information regarding the activities of which respondents complained; this information is set out primarily in the affidavits that were filed by the parties in connection with the District Court's consideration of respondents' motion to dismiss. See Fed. Rule Civ. Proc. 12(b). A brief review of that information is helpful to an understanding of the issues.

The President is authorized by 10 U.S.C. § 331 to make use of the armed forces to quell insurrection and other domestic violence if and when the conditions described in that section obtain within one of the States. Pursuant to those provisions, President Johnson ordered federal troops to assist local authorities at the time of the civil disorders in Detroit, Michigan, in the summer of 1967 and during the disturbances that followed the assassination of Dr. Martin Luther King. Prior to the Detroit disorders, the Army had a general contingency plan for providing such assistance to local authorities, but the 1967 experience led Army authorities to believe that more attention should be given to such preparatory planning. The data-gathering system here involved is said to have been established in connection with the development of more detailed and specific contingency planning designed to permit the Army, when called upon to assist local authorities, to be able to respond effectively with a minimum of force. . . .

The system put into operation as a result of the Army's 1967 experience consisted essentially of the collection of information about public activities that were thought to have at least some potential for civil disorder, the reporting of that information to Army Intelligence headquarters at Fort Holabird, Maryland, the dissemination of these reports from headquarters to major Army posts around the country, and the storage of the reported information in a computer data bank located at Fort Holabird. The information itself was collected by a variety of means, but it is significant that the principal sources of information were the news media and publications in general circulation. Some of the information came from Army Intelligence agents who attended meetings that were open to the public and who wrote field reports describing the meetings, giving such data as the name of the sponsoring organization, the identity of speakers, the approximate number of persons in attendance, and an indication of whether any disorder occurred. And still other information was provided to the Army by civilian law enforcement agencies.

The material filed by the Government in the District Court reveals that Army Intelligence has field offices in various parts of the country; these offices are staffed in the aggregate with approximately 1,000 agents, 94% of whose time is devoted to the organization's principal mission, which is unrelated to the domestic surveillance system here involved.

By early 1970 Congress became concerned with the scope of the Army's domestic surveillance system; hearings on the matter were held before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. Meanwhile, the Army, in the course of a review of the system, ordered a significant reduction in its scope. For example, information referred to in the complaint as the "blacklist" and the records in the computer data bank at Fort Holabird were found unnecessary and were destroyed, along with other related records. One copy of all the material relevant to the instant suit was retained, however, because of the pendency of this litigation. The review leading to the destruction of these records was said at the time the District Court ruled on petitioner's motion to dismiss to be a "continuing" one (App. 82), and the Army's policies at that time were represented as follows in a letter from the Under Secretary of the Army to Senator Sam J. Ervin, Chairman of the Senate Subcommittee on Constitutional Rights:

> "[R]eports concerning civil disturbances will be limited to matters of immediate concern to the Army--that is, reports concerning outbreaks of violence or incidents with a high potential for violence beyond the capability of state and local police and the National Guard to control. These reports will be collected by liaison with other Government agencies and reported by teletype to the Intelligence Command. They will not be placed in a computer . . . . These reports are destroyed 60 days after publication or 60 days after the end of the disturbance. This limited reporting system will ensure that the Army is prepared to respond to whatever directions the President may issue in civil disturbance situations and without 'watching' the lawful activities of civilians." (App. 80).

In briefs for petitioners filed with this Court, the Solicitor General has called our attention to certain directives issued by the Army and the Department of Defense subsequent to the District Court's dismissal of the action; these directives indicate that the Army's review of the needs of its domestic intelligence activities has indeed been a continuing one and that those activities have since been significantly reduced.

The District Court held a combined hearing on respondent's motion for a preliminary injunction and petitioner's motion for dismissal and thereafter announced its holding that respondents had failed to state a claim upon which relief could be granted. It was the view of the District Court that respondents failed to allege any action on the part of the Army that was unlawful in itself and further failed to allege any injury or any realistic threats to their rights growing out of the Army's actions.

In reversing, the Court of Appeals noted that respondents "have some difficulty in establishing visible injury":

> "[T]hey freely admit that they complain of no specific action of the Army against them. . . . There is no evidence of illegal or unlawful surveillance activities. We are not cited to any clandestine intrusion by a military agent. So far as is yet shown, the information gathered is nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand." 144 U.S. App. D.C. at 78, 444 F.2d at 593.

The court took note of petitioners' argument "that nothing [detrimental to respondents] has been done, that nothing is contemplated to be done, and even if some action by the Army against [respondents] were possibly foreseeable, such would not present a presently justiciable controversy." With respect to this argument, the Court of Appeals had this to say:

> "This position of the [petitioners] does not accord full measure to the rather unique arguments advanced by appellants [respondents]. While [respondents] do indeed argue that in the future it is possible that information relating to matters far beyond the responsibilities of the military may be misused by the military to the detriment of these civilian [respondents], yet [respondents] do not attempt to establish this as a definitely foreseeable event, or to base their complaint on this ground. Rather, [respondents] contend that the present existence of this system of gathering and distributing information, allegedly far beyond the mission requirements of the Army, constitutes an impermissible burden on [respondents] and other person similarly situated which exercises a present inhibiting effect on their full expression and utilization of their First Amendment Rights. . . ." Id. at 79, 444 F.2d, at 954. (Emphasis in original.)

Our examination of the record satisfies us that the Court of Appeals properly identified the issue presented, namely, whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose. We conclude, however, that, having properly identified the issue, the Court of Appeals decided that issue incorrectly.

In recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or "chilling," effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.

E.g., Baird v. State Bar of Arizona, 401 U.S. 1 (1971); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Lamont v. Postmaster General, 381 U.S. 301 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964). In none of these cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of these activities, the agency might in the future take some other and additional action detrimental to that individual. Rather, in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging.

. . . .

The decisions in these cases fully recognize that governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights. At the same time, however, these decisions have in no way eroded the

> "established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action. . . ." Ex parte Levitt, 302 U.S. 633, 634 (1937).

The respondents do not meet this test; their claim, simply stated, is that they disagree with the judgments made by the Executive Branch with respect to the type and amount of information the Army needs and that the very existence of the Army's data-gathering system produces a constitutionally impermissible chilling effect upon the exercise of their First Amendment rights. That alleged "chilling" effect may perhaps be seen as arising from respondents' very perception of the system as inappropriate to the Army's role under our form of government, or as arising from respondents' beliefs that it is inherently dangerous for the military to be concerned with activities in the civilian sector, or as arising from respondents' less generalized yet speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to respondents. Allegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; "the federal courts established pursuant to Article III of the Constitution do not render advisory opinions." United Public Workers v. Mitchell, 330 U.S. 75, 89 (1947).

Stripped to its essentials, what respondents appear to be seeking is a broad-scale investigation, conducted by themselves as private parties armed with the subpoena

power of a federal district court and the power of cross-examination, to probe into the Army's intelligence-gathering activities, with the district court determining at the conclusion of that investigation the extent to which those activities may or may not be appropriate to the Army's mission. The following excerpt from the opinion of the Court of Appeals suggests the broad sweep implicit in its holding:

> "Apparently in the judgment of the civilian head of the Army not everything being done in the operation of this intelligence system was necessary to the performance of the military mission. If the Secretary of the Army can formulate and implement such judgment based on facts within his Departmental knowledge, the United States District Court can hear evidence, ascertain the facts, and decide what, if any, further restrictions on the complained-of activities are called for to confine the military to their legitimate sphere of activity and to protect [respondents'] allegedly infringed constitutional rights." 144 U.S. App. D.C., at 83, 444 F.2d, at 958. (Emphasis added.)

Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the "power of the purse"; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action.

We, of course, intimate no view with respect to the propriety or desirability, from a policy standpoint, of the challenged activities of the Department of the Army; our conclusion is a narrow one, namely, that on this record the respondents have not presented a case for resolution by the courts.

The concerns of the Executive and Legislative Branches in response to disclosure of the Army surveillance activities--and indeed the claims alleged in the complaint--reflect a traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military. Those prohibitions are not directly presented by this case, but their philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime. Indeed when presented with claims of judicially cognizable injury, resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

Reversed

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BERLIN DEMOCRATIC CLUB v. RUMSFELD
410 F. Supp. 144 (D.D.C. 1976)

[The facts of the case are set out beginning at page 3-74.]

JUSTICIABILITY

Defendants rely heavily upon Laird v. Tatum, 408 U.S. 1, 92 S. Ct. 2318, 33 L.Ed.2d 154 (1973), in arguing that the plaintiffs have not presented a justiciable controversy. In Tatum, a group of civilians complained that the intelligence gathering and dissemination activities of the Army in the United States chilled them in the exercise of their first amendment rights. . . . It was clear that there was "no evidence of illegal or unlawful surveillance activities"; there was no "clandestine intrusion by a military agent." 408 U.S. at 9, 92 S. Ct. at 2323, 33 L.Ed.2d at 161; quoting from 144 U.S. App. D.C. 72, at 78, 444 F.2d 947, at 953. Nothing detrimental had been done to the plaintiffs, nor was anything detrimental contemplated. Id. The only challenged action was the existence of the intelligence gathering and disseminating system. To allege that this chilled first amendment rights, according to the Court, was "not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." 408 U.S. at 14, 92 S. Ct. at 2326, 33 L.Ed.2d at 164.

Tatum is readily distinguishable from the instant case. All of the plaintiffs alleged purposeful dissemination of intelligence information resulting in termination or restriction of employment opportunities, unfair military trials, or damaged reputations. Plaintiffs further allege that their phones have been illegally wiretapped and their activities have deliberately and intentionally been disrupted by infiltrators who either provided them false information or entreated them to illegal action. Certain plaintiffs complain that they have been barred from access to U.S. military facilities, have lost their jobs, or have been denied employment because of the dissemination. One plaintiff alleges that the German authorities were induced by American officials to institute deportation proceedings against her. None of these actions were part of the intelligence gathering system challenged in Tatum. Such actions clearly are justiciable.[312]

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[312]See also Meese v. Keene, 481 U.S. 465 (1987) ("chill" on speech sufficient to support standing to challenge "political propaganda" label under Foreign Agents Registration Act); American Library Association v. Barr 956 F.2d 1178 (D.C. Cir. 1992) (subjective chill alone will not suffice to confer

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(C) Past exposure to putatively unlawful conduct does not necessarily afford present standing to seek prospective relief--such as an injunction--from the conduct. Rather, a plaintiff must show "continuing, adverse effects" from the challenged activity.[313] "[S]tanding must be premised upon more than hypothetical speculation and conjecture that harm will occur in the future."[314] For example, in City of Los Angeles v. Lyons,[315] the plaintiff was subjected to an allegedly unprovoked and unjustified "chokehold" by a police officer in the course of a routine traffic stop. The plaintiff sued the City of Los Angeles seeking, inter alia, an injunction prohibiting the use of "chokeholds" by the Los Angeles Police Department. The Supreme Court characterized the plaintiff's claim as dependent upon the likelihood he would "suffer future injury from the use of chokeholds by police officers."[316] The Court held, however, that the threat the plaintiff might be injured from a similarly unlawful chokehold in the future was too speculative to support standing:

> That Lyons may have been illegally choked by the police on October 6, 1976, . . . does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.[317]

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(..continued)
standing on litigant to bring preenforcement facial challenge to statute allegedly infringing on freedom of speech); United Presbyterian Church v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984) (generalized challenge to military intelligence-gathering activities cannot support standing in federal courts).

[313]O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974).

[314]Palmer v. City of Chicago, 755 F.2d 560, 571 (7th Cir. 1985); Stewart v. McGinnis, 5 F.3d 1031 (7th Cir. 1993), cert. denied, 510 U.S. 1121 (1994). See also Rizzo v. Goode, 423 U.S. 362, 372 (1976); La Duke v. Nelson, 762 F.2d 1318, 1323-25 (9th Cir. 1985), amended by, 796 F.2d 309 (1986).

[315]461 U.S. 95 (1983).

[316]Id. at 105.

[317]Id. at 110.

(ii) Causation. In addition to demonstrating the existence of a distinct and palpable injury, a plaintiff must show that the injury is traceable to the putatively unlawful acts or omissions of the defendant.[318] An example of the application of the causation requirement is Warth v. Seldin.[319] In Warth, various organizations and individuals in Rochester, New York, sued an adjacent town, Penfield, claiming that Penfield's zoning ordinance effectively excluded persons of low and moderate income from living in the town. The Supreme Court held the petitioners lacked standing to challenge Penfield's zoning ordinance in part because there was no established connection between the petitioners' inability to live in the town and the challenged ordinance:

> In their complaint, [the petitioners] alleged in conclusory terms that they were among the persons excluded by respondents' actions. None of them has ever resided in Penfield; each claims at least implicitly that he desires, or has desired, to do so. Each asserts, moreover, that he made some effort at some time, to locate housing in Penfield that was at once within his means and adequate for his family's needs. Each claims that his efforts proved fruitless. We may assume, as petitioners allege, that respondents' actions have contributed, perhaps substantially, to the cost of housing in Penfield. But there remains the question whether petitioners' inability to locate suitable housing in Penfield reasonably can be said to have resulted, in any concretely demonstrable way, from respondents' alleged constitutional and statutory infractions. Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed. Linda R. S. v. Richard D., 410 U.S. 614 (1973).

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[318] E.g., Franklin v. Massachusetts, 505 U.S. 788 (1992); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Diamond v. Charles, 476 U.S. 54, 65 (1986); Allen v. Wright, 468 U.S. 737, 751 (1984); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 72 (1978); Jorman v. Veterans Administration, 830 F.2d 1420 (7th Cir. 1987); Community for Creative Non-Violence v. Pierce, 814 F.2d 663, 668-69 (D.C. Cir. 1987); Haitian Refugee Center v. Gracey, 809 F.2d 794, 800-07 (D.C. Cir. 1987).

[319] 422 U.S. 490 (1975).

We find the record devoid of the necessary allegations. As the Court of Appeals noted, none of these petitioners has a present interest in any Penfield property; none is himself subject to the ordinance's strictures; and none has ever been denied a variance or permit by respondent officials. . . . Instead, petitioners claim that respondents' enforcement of the ordinance against third parties--developers, builders, and the like--has had the consequence of precluding the construction of housing suitable to their needs at prices they might be able to afford. The fact that the harm to petitioners may have resulted indirectly does not in itself preclude standing. When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights. E.g., Roe v. Wade, 410 U.S. 113, 124 (1973). But it may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.

Here, by their own admission, realization of petitioners' desire to live in Penfield always has depended on the efforts and willingness of third parties to build low- and moderate-cost housing. The record specifically refers to other two such efforts: that of Penfield Better Homes Corp., in late 1969, to obtain the rezoning of certain land in Penfield to allow the construction of subsidized cooperative townhouses that could be purchased by persons of moderate income; and a similar effort by O'Brien Homes, Inc., in late 1971. But the record is devoid of any indication that these projects, or other like projects, would have satisfied petitioners' needs at prices they could afford, or that, were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners. Indeed, petitioners' descriptions of their individual financial situations and housing needs suggest precisely the contrary--that their inability to reside in Penfield is the consequence of the economies of the area housing market, rather than of respondents' assertedly illegal acts. In short, the facts alleged fail to support an actionable causal relationship between Penfield's zoning practices and petitioners' asserted injury.[320]

[320]Id. at 503-07 (footnotes omitted). See also Gilbert v. Shalala, 45 F.3d 1391 (10th Cir. 1995), cert. denied, 116 S. Ct. 49 (1995); Day v. Shalala, 23 F.3d 1052 (6th Cir. 1994); (plaintiffs must show that they detrimentally relied upon the defective denial notice to establish standing); Committee for Monetary Reform v. Board of Governors, 766 F.2d 538, 542 (D.C. Cir. 1985).

(iii) Redressability. Finally, a plaintiff must establish that his injury is likely to be redressed by a favorable decision of the court.[321] For example, in Linda R. S. v. Richard D.,[322] the mother of an illegitimate child filed a lawsuit seeking to require a local district attorney to commence criminal proceedings for nonsupport against the putative father of the child. The Court, affirming the judgment of a three-judge district court, found that the appellant-mother was without standing to seek enforcement of the criminal nonsupport statute in the federal courts. Such enforcement would only result in the jailing of the child's father; it would not redress the appellant's injury: nonsupport.[323]

(d) Prudential Standing Considerations. "Beyond the constitutional requirements, the federal judiciary also adheres to a set of prudential principles that bear on the question of standing."[324] There are three prudential rules of standing: (1) the plaintiff ordinarily must assert his own legal interests, rather than those of third parties (jus tertii); (2) the plaintiff's injury must not be merely a "generalized grievance" shared in similar measure by all or a large class of citizens, and (3) the plaintiff's interests must come within the "zone of interests" arguably protected or regulated by the law in

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[321]Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976); Oklahoma Hosp. Ass'n v. Oklahoma Publ. Co., 748 F.2d 1421, 1424-25 (10th Cir. 1984), cert. denied, 473 U.S. 905 (1985). See also Fernandez v. Brock, 840 F.2d 622, 627 (9th Cir. 1988) (relief requested must assure favorable results and not merely increase the opportunity of such results).

[322]410 U.S. 614 (1973).

[323]Id. at 618. See also Franklin v. Massachusetts, 505 U.S. 788 (1992); Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992); Diamond v. Charles, 476 U.S. 54, 65 (1986); United Food and Commercial Workers International Union, Local 751 v. Brown Group, 50 F.3d 1426 (8th Cir. 1995), rev'd, 116 S. Ct. 1529 (1996); DeBoli v. Espy, 47 F.3d 777 (6th Cir. 1995); Community for Creative Non-Violence v. Pierce, 814 F.2d 663, 669-70 (D.C. Cir. 1987); Haitian Refugee Center v. Gracey, 809 F.2d 794, 801-07 (D.C. Cir. 1987). But see United Food and Commercial Workers International Union, Local 751 v. Brown Group, 116 S.Ct. 1529 (1996).

[324]Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982).

question.[325] "These limitations arise from a perceived institutional need for judicial self-restraint rather than the Constitution itself."[326] "The Court imposes these limitations because while not mandated by article III, they nonetheless serve the policy of separation of powers."[327] A plaintiff who fails to satisfy these prudential rules generally lacks standing even though his case may fall within the constitutional boundaries of standing.[328] Unlike constitutional standing requirements, however, these prudential limitations may be overcome by Congress,[329] or by the courts themselves if they find countervailing considerations outweigh the prudential concerns.[330]

(i) Jus tertii.

(A) As a general rule, "[a] litigant may invoke only his own constitutional rights or immunities;" he may not claim standing to vindicate the constitutional rights or immunities of some third party.[331] The reasons for this limitation are two: (1) courts should not make

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[325]Id. at 474-75. See also Allen v. Wright, 468 U.S. 737, 751 (1984); Warth v. Seldin, 422 U.S. 490, 499-501 (1974); NAACP v. City of Richmond, 743 F.2d 1346, 1351 (9th Cir. 1984).

[326]Logan, Standing to Sue: A Proposed Separation of Power Analysis, 1984 Wis. L. Rev. 37, 46.

[327]Id. at 47.

[328]Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979); Fors v. Lehman, 741 F.2d 1130, 1132 (9th Cir. 1984).

[329]E.g., Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979); Bread Political Action Comm. v. FEC, 455 U.S. 577, 581 (1982); Havens Realty Corp. v. Coleman, 455 U.S. 363, 375-76 (1982).

[330]Singleton v. Wulff, 428 U.S. 106, 113-15 (1976); Warth v. Seldin, 422 U.S. 490, 500-01 (1975).

[331]Monaghan, Third Party Standing, 84 Colum. L. Rev. 277 (1984). See Tileston v. Ullman, 318 U.S. 44, 46 (1943); Tyler v. Judges of Ct. of Registration, 179 U.S. 405, 406 (1900); Haitian Refugee Center v. Gracey, 809 F.2d 794, 808-11 (D.C. Cir. 1987); Darring v. Kincheloe, 783 F.2d 874, 877 (9th Cir. 1986); Allstate Ins. Co. v. Wayne County, 760 F.2d 689, 693-94 (6th Cir. 1985); Ex parte Hefner, 599 F. Supp. 95 (E.D. Tex. 1984); Family Planning Clinic, Inc. v. City of Cleveland, 594 F.

footnote continued next page

unnecessary constitutional adjudications; and (2) the holders of constitutional rights usually are the best parties to assert the rights.[332] The federal courts will permit jus tertii standing where the underlying justifications for the limitation are absent. In determining whether to permit such standing, the courts will consider the relationship of the litigant to the third party whose right is asserted, the effect of the challenged law or action on the nonlitigant third party, and the ability of the nonlitigant third party to assert his or her own rights.[333] Thus, for example, the courts have permitted jus tertii standing in challenges by doctors, brought for their patients, to state-imposed restrictions on access to abortions.[334] Similarly, Congress by statute can permit jus tertii standing. It has done so, for example, by allowing "testers" to enforce the provisions of the Fair Housing Act.[335]

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(..continued)
Supp. 1410, 1412 (N.D. Ohio 1984). Cf. Fors v. Lehman, 741 F.2d 1130 (9th Cir. 1984) (parents lack standing to contest son's reclassification from MIA to KIA). See also Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Indemnified Capital Investments v. R. J. O'Brien & Associates, 12 F.3d 1406 (7th Cir. 1993). See generally Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423 (1974).

[332]Singleton v. Wulff, 428 U.S. 106, 113-14 (1976); Duke Power Co. v. Carolina Envtl. Group, 438 U.S. 59, 80 (1978); Comment, The Generalized Grievance Restriction, supra note 296, at 1167.

[333]Secretary of State of Md. v. J. H. Munson, Co., 467 U.S. 947, 954-58 (1984); Carey v. Population Serv. Internat'l, 431 U.S. 678, 682-84 (1977); Craig v. Boren, 429 U.S. 190, 192-97 (1976); Singleton v. Wulff, 428 U.S. 106, 114-15 (1976); Barrows v. Jackson, 346 U.S. 249, 255-57 (1953); See also Haitian Refugee Center v. Gracey, 809 F.2d 794, 809 (D.C. Cir. 1987) ("Third party standing . . . is appropriate only when the third party's rights protect that party's relationship with the litigant").

[334]E.g., Singleton v. Wulff, 428 U.S. 106 (1976). Accord Family Planning Clinic, Inc. v. City of Cleveland, 594 F. Supp. 1410 (N.D. Ohio 1984) (challenge by free-standing abortion facility to zoning ordinance prohibiting license in desired location); see also Volunteer Medical Clinic, Inc. v. Operation Rescue, 948 F.2d 218 (6th Cir. 1991); Planned Parenthood Ass'n v. City of Cincinnati, 822 F.2d 1390 (6th Cir. 1987) (operator of abortion clinic and medical director had standing to challenge city fetal-disposal ordinance).

[335]E.g., Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979). Accord Watts v. Boyd Properties, Inc., 758 F.2d 1482, 1485 (11th Cir. 1985) ("testers" have standing under 42 U.S.C. § 1982).

(B) A corollary principle to jus tertii standing is that a plaintiff generally may only challenge a statute or a regulation in the terms in which it is applied to him. He may not contest the law as it might be construed in some future case.[336] In some types of cases, especially those involving the first amendment, courts have permitted litigants to mount constitutional attacks premised on future possible unconstitutional applications of the law.[337]

(ii) "Generalized Grievances." A plaintiff normally may not assert as injury a "generalized grievance shared in substantially equal measure by all or a large class of citizens. . . ."[338] Simply put, "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."[339] For example, in Schlesinger v. Reservists Comm. to Stop the War,[340] the Supreme Court denied "citizen standing" to plaintiffs seeking to enjoin congressional membership in the Reserve components of the armed forces. The plaintiffs claimed such membership violated the incompatibility clause of the Constitution,[341] which in essence prohibits a member of Congress from holding another federal office. The Court found that whatever injury the

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[336]Parker v. Levy, 417 U.S. 733, 758-61 (1974); Yazoo & Miss. Valley R.R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 219-20 (1912); Hatheway v. Secretary of the Army, 641 F.2d 1376, 1382-83 (9th Cir. 1981), cert. denied, 454 U.S. 864 (1981); Monaghan, supra note 331, at 277-78 & n.5. But see Naturist Society v. Fillyaw, 958 F.2d 1515 (11th Cir. 1992).

[337]See, e.g., Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980); Village of Broadrick v. Oklahoma, 413 U.S. 601, 612-16 (1973).

[338]Warth v. Seldin, 422 U.S. 490, 499 (1975). See also Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974); Laird v. Tatum, 408 U.S. 1 (1972).

[339]Allen v. Wright, 468 U.S. 737, 754 (1984).

[340]418 U.S. 208 (1974).

[341]U.S. Const. art. I, § 6, cl. 2.

plaintiffs had suffered from the putative violation of the incompatibility clause was undifferentiated from the harm suffered by the rest of the public. To permit standing under such circumstances would deprive the Court of the fact-presentation and issue-definition necessary for constitutional adjudications and violate the principle of separation of powers.[342] Consequently, the plaintiffs were held to lack standing to pursue their claim.[343]

(iii) "Zone-of-Interests."

(A) General. The final prudential standing limitation is the so-called "zone-of-interest" test first announced by the Supreme Court in Association of Data Processing Service Organizations v. Camp,[344] In Data Processing, the plaintiffs, an association of vendors of data processing services, challenged a ruling by the Comptroller of the Currency that national banks may make data processing services available to other banks and to bank customers. There was no question that the plaintiffs had been injured by the ruling--they faced lost customers and reduced profits.[345] Instead, the Court added a new layer to the standing inquiry, and considered whether the interest sought to be protected by the plaintiffs was "arguably within the zone of interests to be protected or regulated

[342]Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. at 220-22.

[343]See also Ex parte Levitt, 302 U.S. 633 (1937) (challenge to the appointment of Justice Hugo Black to the Supreme Court based on the incompatibility clause); McKinney v. United States Dep't of the Treasury, 799 F.2d 1544, 1553 (Fed. Cir. 1986) (challenge to Customs Service decision to permit importation of Soviet goods allegedly produced by "forced labor"); Americans United for Separation of Church & State v. Reagan, 786 F.2d 194, 200 (3d Cir.), cert. denied, 479 U.S. 914 (1986) (challenge to establishment of diplomatic relations with the Vatican); Pietsch v. Bush, 755 F. Supp. 62, 67 (E.D.N.Y. 1991) (challenge to military activities in Persian Gulf following invasion of Kuwait by Iraq), aff'd, 935 F.2d 1278 (2nd Cir. 1991), cert. denied, 502 U.S. 914 (1991); Antosh v. Federal Election Comm'n, 631 F. Supp. 596, 598 (D.D.C. 1986) (challenge by Oklahoma resident to Arizona election).

[344]397 U.S. 150 (1970).

[345]Id. at 152.

by the statute or constitutional guarantee in question."[346] While recognizing that the Administrative Procedure Act (APA) grants wide-reaching standing to persons "aggrieved by agency action within the meaning of a relevant statute,"[347] the Court added a "gloss" to the standing provisions of the APA by limiting the class of people who can challenge governmental action to those whose interests are protected or regulated by the statute or constitutional provision under which the challenge is brought.[348] The Court concluded that the plaintiffs were arguably protected by the statute under which they sued--the Bank Service Corporation Act of 1962[349]--which forbids bank service corporations from engaging in activities other than the performance of bank services for banks.[350]

(B) Application of the "zone-of-interests" test. Since its decision in Data Processing, the Court has inconsistently applied the "zone-of-interests" test.[351] Moreover, the precise boundaries of the test are unclear,[352] and it has been the subject of intense academic criticism.[353]

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[346]Id. at 153.

[347]5 U.S.C. § 702.

[348]Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 153-54 (1970). See also Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987).

[349]12 U.S.C. § 1864.

[350]Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 155 (1970). See also Animal Legal Defense Fund v. Espy, 29 F.3d 720 (D.C. Cir. 1994); National Federation of Federal Employees v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989), cert. denied, 496 U.S. 936 (1990); Investment Co. Inst. v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970); Barlow v. Collins, 397 U.S. 159 (1970).

[351]4 K. Davis, Administrative Law Treatise 273-280 (2d ed. 1983).

[352]Id.

[353]See, e.g., id.; Stewart The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1731-34 (1975).

The Court returned to the test in Clarke v. Securities Industry Association,[354] in which a trade association of securities brokers, underwriters, and investment bankers challenged a decision by the Comptroller of the Currency to permit national banks to open offices offering discount brokerage services to the public. Finding the plaintiff had standing, the Court held that, at least for suits under the APA,[355] the "zone" test was not very demanding. It served the purpose of precluding suits by persons Congress clearly could not have intended to reach under the law at issue.[356]

The zone of interest test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.[357]

The "zone" test focuses on the particular interests the plaintiffs are asserting in the litigation, rather than on the plaintiffs themselves or their interests in general. Thus, if a plaintiff has stated an interest that is arguably within the scope of interests encompassed by the law in question, the "zone" test

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[354]479 U.S. 388 (1987).

[355]"The principal cases in which the zone of interest test has been applied are those involving claims under the APA. . . ." Id. at 400 n.16.

[356]With only one exception, the Court has invoked the "zone-of-interests" test only to statutes. Id. See Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 320-21 n.3 (1977) ("zone-of-interest" test in suit under commerce clause).

[357]Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987) (footnotes omitted), overruling Control Data Corp. v. Baldrige, 655 F.2d 283, 293-94 (D.C. Cir.), cert. denied, 454 U.S. 881 (1981) (requiring indicia of congressional intent to benefit plaintiff).

is satisfied.[358] For example, in Calumet Industries, Inc. v. Brock,[359] manufacturers of carcinogenic lubricants contested a determination of the Occupational Safety and Health Administration [OSHA] that exempted certain other lubricants from a labelling requirement. The labels notified users of the effected lubricants of their potential hazards. Even though the plaintiffs' products were in fact carcinogenic, they contended that there was no bright line between a carcinogenic and noncarcinogenic lubricant. And until such a distinction could clearly be made, the plaintiff's contended that OSHA should require all manufacturers of lubricating oils to label their products. The court held, however, that the interest protected by Occupational Safety and Health Act[360] was worker safety, not business profits. Consequently, the competitive interests asserted by the plaintiffs did not fall within the zone of interests protected by the Act.[361]

(C) The "zone-of-interest" test arises in military cases when servicemembers or civilian employees base their claims for relief on statutes or regulations never

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[358]Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130, 142 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978). See also Haitian Refugee Center v. Gracey, 809 F.2d 794, 812 (D.C. Cir. 1987).

[359]807 F.2d 225 (D.C. Cir. 1986).

[360]29 U.S.C. § 655(b).

[361]Calumet Indus., Inc. v. Brock, 807 F.2d at 228. See also Air Courier Conference of America v. American Postal Workers Union, 498 U.S. 517 (1991); National Federation of Federal Employees v. Cheney, 883 F.2d 1038 (D.C. Cir.) reh'g denied, 892 F.2d 98 (D.C. Cir. 1989), cert. denied, 496 U.S. 936 (1990); Haitian Refugee Center v. Gracey, 809 F.2d 794, 811-16 (D.C. Cir. 1987); Libertad v. Welch, 53 F.3d 428 (1st Cir. 1995); Schering Corporation v. FDA, 51 F.3d 390 (3d Cir. 1995), cert. denied, 116 S. Ct. 274 (1995); Animal Legal Defense Fund v. Espy, 29 F.3d 720 (D.C. Cir. 1994). Compare Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S. Ct. 698 (1996); Legal Assistance for Vietnamese Asylum Seekers v. Department of State, 45 F.3d 469 (D.C. Cir. 1995), ; Investment Co. Inst. v. FDIC, 815 F.2d 1540, 1544 (D.C. Cir. 1987), cert. denied, 484 U.S. 847 (1987), rev'g, 594 F.Supp 502 (D.D.C. 1984); Hotel & Restaurant Emps. Union v. Attorney General, 804 F.2d 1256, 1263 (D.C. Cir. 1986).

intended to benefit them. An example of the application of the "zone-of-interest" test in the military is Hadley v. Secretary of the Army.

HADLEY v. SECRETARY OF THE ARMY
479 F. Supp. 189 (D.D.C. 1979)

MEMORANDUM AND ORDER

OBERDORFER, District Judge.

This matter is before the Court on cross-motions by the parties for summary judgment. The plaintiff, a major in the Army Medical Corps, brought this action for declaratory and injunctive relief to compel the Secretary of the Army to (honorably) discharge him in accordance with 10 U.S.C. § 3303 (1976). The Army's promotion system for officers provides generally that an officer seeking advancement in rank will be considered by promotion selection boards established and governed by statute. See 10 U.S.C. §§ 3281-3314 (1976). An officer who is not recommended for promotion by a board becomes a "deferred officer"; section 3303 provides that a deferred officer who is not recommended for promotion by the next promotion board to consider him "shall . . . be honorably discharged." 10 U.S.C. § 3303(d).

Plaintiff maintains that having been passed over twice for promotion by statutory promotion selection boards, the Army is compelled to discharge him, despite the fact that he thereafter was promoted. Plaintiff asserts that a subsequent promotion conferred by a Standby Advisory Board ("STAB") exceeded statutory authority and could not nullify the action of the statutory promotion boards. He complains that he is stigmatized by the two pass-overs, and despite his later promotion, is subject to embarrassment and humiliation because of his failure to be promoted by statutory promotion selection boards. Plaintiff also asserts that the presence in his personnel record of the material that justified his earlier nonpromotions will effectively foreclose him from future advancement in rank.

The Secretary takes issue with each of the plaintiff's allegations. He asserts that the provision requiring discharge after two "pass-overs" exists solely for the benefit of the Army, and does not confer upon military officers a right to discharge. In addition, the Secretary argues that any effect of plaintiff's second non-promotion was nullified by subsequent favorable review by the STAB Board, which had legal authority to reverse the findings of the statutory board. Finally, the Secretary maintains that to the extent that the plaintiff is subject to the embarrassment or prejudice by the presence of adverse

material in his personnel file, he has failed to exhaust administrative remedies established by statute and Army regulation.

The exchange of legal assertions, however, only begins to render intelligible the novel issues before the Court. In reality, plaintiff complains that he is the victim of a "wrongful promotion," illegally conferred upon him by the Secretary. The implications of the controversy can best be understood in the context of the fact that plaintiff received his college and medical training at government expense in return for a substantial commitment to serve in the U.S. Army. Defendant's Cross Motion for Summary Judgment, July 12, 1979, Ex. A at 38-39, 96 (hereinafter "Exhibit A"). He had only just begun to fulfill that obligation when he filed the instant action, accusing the Secretary of "contriving" to keep him in the Army in violation of law.

The resolution of this case turns fundamentally upon plaintiff's rights and the defendant's duties under 10 U.S.C. § 3303(d). The parties' statements of material facts filed pursuant to Local Rule 1-9(h) make plain that there are no genuine issues of material fact as to any of the issues raised by the cross-motions for summary judgment. The Court holds that the undisputed material facts warrant the entry of summary judgment for the defendant.

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. . . Plaintiff's claim that the Army wrongfully promoted and failed to discharge him turns upon whether 10 U.S.C. § 3303(d) confers upon an officer the right to compel the Army to discharge him if he has twice failed to be promoted by statutory promotion selection boards. To litigate this claim, plaintiff must first establish that he has standing to complain of the Army's action. Specifically, a party will be denied standing if the interest allegedly injured is not arguably within the zone of interests protected by the statute invoked, even though injury in fact has been sufficiently established. Committee for Auto Responsibility v. Solomon, 195 U.S.App.D.C. 340, 603 F.2d 992 (D.C. Cir. 1979); Tax Analysts & Advocates v. Blumenthal, 184 U.S.App.D.C. 238, 566 F.2d 130 (1977). For the reasons set forth below, the Court concludes that plaintiff Hadley lacks standing to bring this action.

The statutory basis for the Army promotion system is the Officer Personnel Act of 1947, as amended. Act of August 7, 1947, ch. 512, 61 Stat. 795 (1947). The Act substituted a system of statutory promotion selection boards for the former, seniority-based system. Under the promotion board scheme, which has been incorporated virtually intact into the present section 3303, each officer is considered for promotion by a selection board whose membership and procedures are set out by statute. See 10 U.S.C. §§ 3281-3314 (1976). An officer who has been once considered by a selection board and not recommended for promotion becomes a "deferred officer." A

deferred officer is considered for promotion by the next selection board considering officers of his grade. Section 3303(d) provides that:

> A deferred officer who is not recommended by the next selection board considering officers of his grade shall . . . (3) . . . be honorably discharged. . . .

10 U.S.C. § 3303(d) (1976).

The purpose of this system, as described by the House Report on the Act, was to strengthen the officers corps. H.R. Rep. No. 640, 80th Cong., 1st Sess. 3 (1947). The provisions of section 3303 are plainly for the benefit of the Army, to guarantee that the most fit officers are systematically selected for promotion and the remaining officers are discharged. The statute cannot sensibly be read to encompass the interest of an officer to seek a discharge when the Army has determined that its interests would best be served by his retention. Such an interpretation would contravene the well-established principle that statutes pertaining to the Army should be read narrowly, so as to limit judicial interference in military affairs and protect the discretion of military commanders. See, e.g., Parker v. Levy, 417 U.S. 733, 743, 94 S. Ct. 2547, 41 L.Ed.2d 439 (1974); Orloff v. Willoughby, 345 U.S. 83, 94, 73 S. Ct. 534, 97 L.Ed. 842 (1953); Dilley v. Alexander, 195 U.S.App.D.C. 332, 337-338, 603 F.2d 914, 919-920 (1979). In similar situations, where military personnel have sought to invoke a provision relating to the fitness of personnel as a lever to force their discharge, the Courts have uniformly rejected the proffered constructions. See Orloff v. Willoughby, supra; Allgood v. Kenan, 470 F.2d 1071 (9th Cir. 1972); Silverthorne v. Laird, 460 F.2d 1175, 1186 (5th Cir. 1972). For such a construction would create incentives for military personnel to disqualify themselves physically, or in this case create disincentives for promotion, which would tend to defeat the obvious objective of Congress to create incentives for military personnel to keep fit and to strive for promotion. See Orloff v. Willoughby, supra, 345 U.S. at 94-95, 73 S. Ct. 534.

The conclusion that this plaintiff's claim for discharge is not in the zone of interests protected by 10 U.S.C. § 3303(d) is quite consistent with the Court's recognition that section 3303 protects the interests of officers wrongfully refused promotion and discharged. See, e.g., Knehans v. Alexander, 184 U.S.App.D.C. 420, 566 F.2d 312 (1977), cert. denied, 435 U.S. 995, 98 S. Ct. 1646, 56 L.Ed.2d 83 (1978). It is no great leap to conclude that a statute designed to strengthen the officer corps would protect the interests of qualified officers who are wrongfully denied promotions through violations of specific procedural guarantees. An officer being discharged, having been wrongfully denied promotion on account of discrimination, for example, might also have such a claim. But the plaintiff here conspicuously fails to

complain about the underlying decisions not to promote him. He seeks instead to capitalize upon them by a discharge.

Finally, plaintiff lifts the phrase "shall . . . be honorably discharged" in section 3303(d) out of its context to allege that it is mandatory and designed to confer a right of discharge upon an unhappy officer. This interpretation does not survive analysis. The term "shall" in section 3303(d) precedes three alternatives that describe how an officer not recommended for promotion shall be separated from the Army; it guarantees that officers eligible for retirement will not be perfunctorily discharged, but will be treated with concern for approaching retirement dates. Section 3303(d)(1) guarantees that an officer within two years of retirement under section 3913 will be maintained on the active list until he is eligible for retirement. Read in its entirety, section 3303(d) is plainly inconsistent with the plaintiff's argument that it is designed to protect the interest of a non-promoted officer in a speedy severance from the Army. To the extent that section 3303(d) imposes any mandatory duty upon the Army, it is to protect the interests of a non-promoted officer after the Army has made a discretionary determination to discharge him. It requires the Army to separate the officer in accordance with the provisions of section 3303(d)(1-3) rather than by immediate discharge, without severance pay or concern for upcoming retirement dates.

The Court concludes that the plaintiff's claim is not arguably within the zone of interests protected by section 3303(d) of Title 10, U.S.C. He may not, for this reason, complain of the action of the STAB Board in promoting him to Captain, RA, or of the Secretary of the Army in retaining him on active service. He must, in contending with the consequences of administrative grace, accept the sweet with the bitter. Knehans v. Alexander, 184 U.S.App.D.C. at 423, 566 F.2d at 315; compare Arnett v. Kennedy, 416 U.S. 134, 153-54, 94 S. Ct. 1633, 40 L.Ed.2d 15 (1974).

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In sum, the Court holds that the defendant is entitled to summary judgment as a matter of law.[362]

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[362]See also Allgood v. Kenan, 470 F.2d 1071 (9th Cir. 1972) (no standing to demand discharge for unsuitability); Silverthorne v. Laird, 460 F.2d 1175 (5th Cir. 1972) (no standing to demand discharge for unfitness or unsuitability); Cortright v. Resor, 447 F.2d 245, 251 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972) (no standing to contest transfer on ground PCS regulation violated where regulation existed for purpose of cost efficiency in Army). But cf. Specter v. Garrett, 971 F.2d 936 (3d Cir. 1992), rev'd on other grounds, 511 U.S. 462 (1994); Friends of the Earth v. United States Navy, 841 F.2d 927 (9th Cir. 1988).

(e) Taxpayer Standing.

(i) The Supreme Court, in Flast v. Cohen,[363] relaxed somewhat the concept of standing in a limited class of cases involving plaintiffs suing as federal taxpayers.[364] In Flast, the plaintiffs challenged, on first amendment establishment clause grounds, the use of federal funds to assist parochial schools under the Elementary and Secondary Education Act of 1965. The plaintiffs claimed standing as federal taxpayers. The Court found nothing in article III to absolutely bar such standing,[365] and held that to establish taxpayer standing a plaintiff must show a "logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated."[366] The nexus demanded of federal taxpayers has two aspects. First, the plaintiff must establish a "logical link" between the taxpayer status and the type of legislative enactment being challenged.[367] Taxpayer standing is only proper where the plaintiff attacks exercises of congressional power under the taxing and spending clause of the Constitution (art. I, § 8).[368] Second, the plaintiff must show a nexus between the taxpayer status and the precise nature of the constitutional infringement alleged.[369] "Under this [second] requirement, the [plaintiff] must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the taxing and spending power and not simply that the enactment is generally

[363]392 U.S. 83 (1968).

[364]But cf. Kurtz v. Baker, 829 F.2d 1133, 1140 (D.C. Cir. 1987) (explained that the Supreme Court believed that although the Flast test is met, taxpayer standing exists only where causation and redressability exist (citing Warth v. Seddon, 422 U.S. 490, 508 (1975)).

[365]Flast v. Cohen, 392 U.S. 83, 101 (1968).

[366]Id. at 102.

[367]Id.

[368]Id.

[369]Id.

beyond the powers delegated to Congress by Art. I, § 8.'[370] In Flast, the Court found that the plaintiffs met the test for taxpayer standing: they had challenged a congressional enactment under the taxing and spending clause (the Elementary and Secondary Education Act of 1965), and they had alleged a specific constitutional limitation on the exercise of the taxing and spending power (the establishment clause of the first amendment).[371]

(ii) The issue of taxpayer standing arose in the military context in a case involving a constitutional challenge to the Army chaplaincy:

KATCOFF v. MARSH
582 F. Supp. 463 (E.D.N.Y. 1984),
aff'd, 755 F.2d 223 (2d Cir. 1985)

MEMORANDUM AND ORDER

McLAUGHLIN, District Judge.

INTRODUCTION

> Chaplains have been members of the United States Army since the Revolutionary War. Plaintiffs, who brought this action while they were still Harvard law students, have never served in the military. They sue to declare the Army Chaplaincy Program (the "Chaplaincy Program," or the "Program") unconstitutional on the ground that it runs afoul of the First Amendment's command that Congress "shall make no law respecting the establishment of religion." U.S. Const. amend. I.

[370] Id. at 102-03 (emphasis added).

[371] Id. at 103-104. See also Kurtz v. Baker, 829 F.2d 1133, 1140 (D.C. Cir. 1987) (no taxpayer standing to contest congressional chaplain program where program receives no federal government stipend); Kurtz v. Kennickell, 622 F. Supp. 1414, 1416 (D.D.C. 1985) (court found taxpayer standing to contest use of public funds to publish prayers offered by congressional chaplains).

There are some who might argue that this question is more the grist of a moot court competition than a case or controversy to occupy the energies of a federal court. There is, thus, a threshold question of plaintiff's standing.

For the reasons set forth below, I conclude that there is a case or controversy, and that the plaintiffs do have standing. On the merits, I conclude that the Chaplaincy Program is constitutional. Accordingly, plaintiffs' motion for summary judgment is denied. Defendants' cross-motion for summary judgment is granted.

. . . .

II. Standing

If plaintiffs have any standing to bring this suit, it can only be by virtue of their status as taxpayers. The analysis, therefore, must begin with Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1942, 30 L.Ed.2d 947 (1968).

In Flast, federal taxpayers sought to declare that the expenditure of federal funds under the Elementary and Secondary Education Act of 1965 constituted a violation of the First Amendment. Recognizing that the 1923 decision in Frothingham v. Mellon, 262 U.S. 447, 43 S. Ct. 597, 67 L.Ed. 1078 (1923) "[had] stood for 45 years as an impenetrable barrier to suits . . . brought by individuals who [could] assert only the interest of federal taxpayers," Flast, supra, 392 U.S. at 85, 88 S. Ct. at 1944, the Supreme Court decided nonetheless, that a fresh examination of the taxpayer standing issue was due.

The Flast Court began by noting that the notion of standing is but one strand in the rope that constitutes the broader concept of justiciability. Standing focuses on the plaintiff to ascertain whether "the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court . . . depends for illumination of difficult constitutional questions.'" Id. at 99, 88 S. Ct. at 1952 (quoting Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct 691, 703, 7 L.Ed.2d 663 (1962)). As subsequent Supreme Court decisions have made clear, the federal judiciary is an inappropriate forum "for the ventilation of public grievances or the refinement of jurisprudential understanding." Valley Forge, supra, 454 U.S. at 473, 102 S. Ct. at 759.

The Flast Court then fashioned a two-pronged test to determine whether the necessary "personal stake" in the outcome has been established. First, the party must establish a "logical link" between his taxpayer status and the type of legislation he challenges. Hence, a taxpayer is a proper party to challenge only "exercises of congressional power under the taxing and spending clause of Art. I, § 8. . . . It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an

essentially regulatory statute." Flast v. Cohen, supra, 392 U.S. at 102, 88 S. Ct. at 1954.

Second, the taxpayer must demonstrate a "nexus" between his status qua taxpayer "and the precise nature of the constitutional infringement alleged. . . . [He] must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." Id. at 102-03, 88 S. Ct. at 1954.

The Court fleshed out the nexus skeleton by holding that plaintiff's challenge to the exercise of the taxing and spending power under Article I, § 8, satisfied the first prong, and that the Establishment Clause of the First Amendment, viewed historically, operated as a specific limitation on Congress' ability to tax and spend. Thus, because the claims were specifically rooted in the Establishment Clause, the second prong was also satisfied.

Application of the two-step test announced in Flast creates a high risk of debasing the concept of taxpayer standing into a constitutional word-game. Fortunately, however, we are not without guidance. The Flast Court itself summarized the standing test:

> Consequently, we hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.

Flast v. Cohen, supra, 392 U.S. at 105-06, 88 S. Ct. at 1955. Thus viewed, the difficult task of finding a "logical link" and a "nexus" is reduced to a more straightforward proposition: The challenged action must be: (1) congressional in nature; (2) an exercise of Congress' taxing and spending power; and (3) an alleged violation of a specific constitutional provision limiting the exercise of that power. Flast v. Cohen, supra; see Valley Forge, supra, 454 U.S. at 478-79, 102 S. Ct. at 761-62.

Two post-Flast cases, in which standing was denied, shed additional light. In United States v. Richardson, 418 U.S. 166, 94 S. Ct. 2940, 41 L.Ed.2d 678 (1974), plaintiff sued the Government to compel the Executive Branch to reveal certain expenditures by the C.I.A. The Court held that plaintiff lacked taxpayer standing because he alleged a violation of the Statement and Account Clause, Art. I, § 9, cl. 7, 50 U.S.C. § 403a et seq., rather than a transgression of the taxing and spending powers of Congress. Id. at 174-75, 94 S. Ct. at 2945-46. Likewise, in Schlesinger v.

Reservists Committee to Stop the War, 418 U.S. 108, 94 S. Ct. 2925, 41 L.Ed.2d 706 (1974), plaintiff failed to establish standing because his challenge to a Pentagon policy allowing members of Congress to retain their status in the Armed Forces Reserve concerned the Incompatibility Clause, not the Taxing and Spending Clause. Id. at 228, 94 S. Ct. at 2935.

Richardson and Schlesinger instruct us that taxpayer standing thrives in narrow confines. Nevertheless, they are of limited assistance here, because the statutes challenged in those cases plainly did not involve Congress' taxing and spending power.

A much closer question was presented in Valley Forge, where plaintiffs challenged the conveyance of some land to the Valley Forge Christian College, a religious institution. The transfer was effected pursuant to three distinct links in the following chain of authority: (a) the Property Clause of the United States Constitution, Art. IV, § 3, cl. 2, vests Congress with the "[p]ower to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States." Pursuant to this constitutional authority, (b) Congress enacted the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471 et seq. The relevant section of the statute is section 484, which provides that "property that has outlived its usefulness to the Federal Government is declared 'surplus' and may be transferred to private or other public entities." Valley Forge, supra, 454 U.S. at 466-67, 102 S. Ct. at 755 (footnote omitted). Subsection (k)(1) of Section 484 authorizes the Secretary of Education to dispose of such surplus property "for school, classroom, or other educational use," and subparagraphs (A) and (C) of that subsection empower the Secretary to take into account any actual or potential benefit to the United States from the sale or lease of property to non-profit, tax exempt institutions. The latter has been further defined by the third link in this chain, 34 C.F.R. § 12.9(a) (1980), which provides for the computation of a "public benefit allowance," discounting the transfer price of the property "on the basis of benefits to the United States from the use of such property for educational purposes."

The land in Valley Forge was appraised at $577,500 when it was conveyed. The Secretary, however, granted a 100% public benefit allowance, thereby permitting Valley Forge Christian College to acquire the property without actually paying anything. Plaintiffs attacked the transfer, asserting that they "would be deprived of the fair and constitutional use of [their] tax dollar .. . in violation of [their] rights under the First Amendment of the United States Constitution." Id. at 469, 102 S. Ct. at 757.

The District Court dismissed the complaint for lack of standing, but the Third Circuit reversed. The Circuit Court conceded that, because taxpayer standing required the challenged enactment to be an exercise of Congressional power under the Taxing

and Spending Clause of Art. I, § 8, plaintiffs had not satisfied the requirements of Flast (the conveyance had been authorized by legislation enacted under the Property Clause).

Blazing a new trail, the Circuit Court, nonetheless, found that plaintiffs had standing, and molded a new concept of standing: Citizens, claiming "'injury in fact' to their shared individuated right to a government that 'shall make no law respecting the establishment of religion,'" Americans United for Separation of Church and State, Inc., v. United States Dep't of H.E.W., 619 F.2d 252, 261 (3d Cir. 1980), rev'd sub nom. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S. Ct. 752, 70 L.Ed.2d 700 (1982), could now bring suits.

It was this "unusually broad and novel view of standing," Valley Forge, supra, 454 U.S. at 470, 102 S. Ct. at 757, that prompted the Supreme Court to grant certiorari. Reversing, the Court reaffirmed Flast. Discussing at length its holdings in Richardson and Schlesinger, the Court regarded these cases as removing "[a]ny doubt that once might have existed concerning the rigor with which the Flast exception to the Frothingham principle ought to be applied." Id. at 481, 102 S. Ct. at 763.

Plaintiffs in Valley Forge failed to satisfy the Flast requirements in several respects. First, their challenge was not to a congressional action directly, but to a decision by an agency--H.E.W.--to transfer federal property. Second, and, as the Court recognized, "perhaps redundantly," the property transfer complained of was an exercise of Congress' power under the Property Clause, Art. IV, § 3, cl. 2, rather than under the Taxing and Spending Clause of Art. I, § 8. Id. at 480, 102 S. Ct. at 762.

Two conclusions emerge from the Flast, Richardson, Schlesinger and Valley Forge cases. To earn standing the plaintiffs must launch their attack against an action by Congress (as distinct from bureaucratic implementation of congressional directives); and that attack must rest squarely upon a specific constitutional limitation on Congress' power under the Taxing and Spending Clause of Article I.

Defendants vigorously deny that either condition has been fulfilled in this case; and they rest foursquare upon Valley Forge for their argument. I find Valley Forge inapposite, however, and I conclude that plaintiffs have standing.

1. The Congressional Action Requirement

In Flast, Congressional funds were spent by New York State on religious materials and instruction. These funds were originally provided by Congress under Title I of the Elementary and Secondary Education Act of 1965. By the terms of 20 U.S.C.

§ 241f (1976), Congress had broad power to oversee expenditures by the states. Congressional action was clearly in issue.

In Valley Forge, the asserted governmental impropriety was the decision by H.E.W. to grant surplus land to a religious organization. Respondents failed "the test for taxpayer standing . . . [because] the source of their complaint [was] not a congressional action, but a decision by HEW to transfer a parcel of federal property." Valley Forge, supra, 454 U.S. at 479, 102 S. Ct. at 762 (footnote omitted).

The challenge here is to that portion of the overall congressional appropriation for the Army that is used for the operation and maintenance of the Chaplaincy Program. This eighty-five million dollar expense is included in the Army's annual budget, and can no more be characterized as "an incidental expenditure of tax funds in the administration of an essentially regulatory statute," Flast v. Cohen, supra, 392 U.S. at 102, 88 S. Ct. at 1954, than could the appropriations that were the subject of the Flast suit. Whatever additional powers Congress may have exercised in passing the Army's budget, which includes funds for the Program, it clearly exercised its Constitutional authority to spend.

Defendants argue that the funds for the Chaplaincy Program are only a small part of the entire Army allocation. This might be a relevant consideration, but only if Congress were unaware of the use to which the funds were being put. If, for example, Congress budgeted funds for one purpose, and a bureaucrat spent them for another and unconstitutional purpose, Congress could not be deemed to have authorized the ultimate expenditure. In such a case, the taxpayer would be challenging unconstitutional action by the Executive Branch, not a Congressional transgression in the exercise of its spending powers. Cf. Public Citizens, Inc. v. Simon, 539 F.2d 211 (D.C. Cir. 1976) (plaintiff lacked taxpayer standing to challenge use of White House staff for campaign purposes in violation of Appropriations Clause).

Congress, however, knows all about the Chaplaincy Program and scrutinizes its funding regularly. "Congress has repeatedly considered, and reaffirmed, the need for an Army Chaplaincy, and has frequently exercised its oversight authority to insure that general appropriations have not been spent unnecessarily. . . ." Defendant's Reply Memorandum at 8. Thus, despite the wide latitude the Army is given in the expenditure of tax dollars, it is Congress that consistently decides whether the Chaplaincy Program merits funding. See infra pt. III, A, 3.

2. The Taxing and Spending Clause Requirement

Defendants make an attractive argument that the constitutional source of the Congress' power over the Chaplaincy Program traces, not to the Taxing and Spending Clause, but to the War Powers Clause of Art. I, § 8. They rely principally upon Velvet

v. Nixon, 415 F.2d 236 (10th Cir. 1969), cert. denied, 396 U.S. 1042, 90 S. Ct. 684, 24 L.Ed.2d 686 (1970), where the Court held that Congressional expenditures for the Viet Nam War were authorized by the War Powers Clause, not by the Taxing and Spending Clause. I reject this argument.

Because there is no litmus test to determine which power Congress exercises in enacting a given statute, some writers have suggested that it is wiser to regard "all government spending [as] an exercise of the congressional power to tax and spend." Davis, Standing: Taxpayers and Others, 35 U.Chi.L.Rev. 601, 605 (1968). This view finds some support in Flast, where the Court repeatedly emphasized that taxpayer standing was designed to allow federal taxpayers to challenge "a specific expenditure of federal funds." Flast v. Cohen, supra, 392 U.S. at 114, 88 S. Ct. at 1960 (Stewart, J., concurring). In limiting the scope of taxpayer standing, the Court's concern was to block challenges to "essentially regulatory statute[s]." Id. at 102, 88 S. Ct. at 1954. It may be fairly inferred that the fact of Congressional spending--rather than the nominal source of that spending--was the Court's central concern.

It cannot be gainsaid that the Chaplaincy Program, like the challenged statute in Flast, involves congressional spending. Absent a clear sign from the Supreme Court to the contrary, I am persuaded that, in such a case, a federal court should not attempt to divine whether a particular statute authorizing spending is enacted under the Taxing and Spending Clause, or under some other, arguably appropriate, source of Congressional power.

It is also noteworthy that the Taxing and Spending Clause itself expressly states that one of the purposes of taxing and spending is to "provide for the common defence." Art. I, § 8, cl. 1. In their affidavits and memoranda, Army personnel and defendants argue that the Chaplaincy is necessary for the efficient functioning of the Army. It would therefore be disingenuous, at best, to conclude that Congress was not acting under the Taxing and Spending Clause when it provided funding for the Chaplaincy.

3. Constitutional Limitations on the Taxing and Spending Power

Flast requires that for a taxpayer to have standing, the challenged action must be grounded in a congressional breach of "a specific limitation upon its taxing and spending power." Flast v. Cohen, supra, 392 U.S. at 105, 88 S. Ct. at 1955. One such limitation is the Establishment Clause: "We have noted that the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, § 8." Id. Plaintiffs, having alleged this specific violation, clearly satisfy this requirement for taxpayer standing.

> Accordingly, for the reasons discussed above, I conclude that plaintiffs have standing, as taxpayers, to challenge the constitutionality of the Chaplaincy Program.
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> [On the merits of the case, the court held the Army chaplaincy was constitutional.]

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(iii) As the judge in Katcoff noted, the Supreme Court has been unwilling to expand taxpayer standing to challenges other than those to legislation enacted under the taxing and spending clause.[372]

Moreover, only challenges to congressional, as opposed to executive branch, action can create taxpayer standing.[373] Finally, the plaintiff must be able to show a specific constitutional limitation on the taxing and spending clause, such as the establishment clause of the first amendment; reliance on a general limitation on congressional power is not sufficient.[374]

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[372]Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) (property clause); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (incompatibility clause); United States v. Richardson, 418 U.S. 166 (1974) (accounting clause). See also Phelps v. Reagan, 812 F.2d 1293, 1294 (10th Cir. 1987) (foreign affairs power); Americans United for Separation of Church & State v. Reagan, 786 F.2d 194, 199 (3d Cir. 1985), cert. denied, 479 U.S. 914 (1986) (foreign affairs power); Pietsch v. Bush, 755 F. Supp. 62, 66-67 (E.D.N.Y. 1991) (war powers and commander-in-chief clauses).

The Supreme Court itself has recognized its unwillingness to expand taxpayer standing beyond the limits of the Flast exception. See Bowen v. Kendrick, 487 U.S. 589, 617 (1988).

[373]Bowen v. Kendrick, 487 U.S. 589 (1988); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 479 (1982); Thompson v. County of Franklin 15 F.3d 245 (2d Cir. 1994); United States v. City of New York, 972 F.2d 464 (2d Cir. 1992); Phelps v. Reagan, 812 F.2d 1293, 1294 (10th Cir. 1987); Americans United for Separation of Church & State v. Reagan, 786 F.2d 194, 200 (3rd Cir. 1985), cert. denied, 479 U.S. 914 (1986).

[374]See Frothingham v. Mellon, 262 U.S. 447 (1923) (fifth amendment due process clause not a specific constitutional limitation). Cf. Clark v. United States, 609 F. Supp. 1249, 1251 (D. Md. 1985) (statutory violations do not create taxpayer standing).

(f) Organizational Standing. The Government often is sued by organizations or associations--ranging from the ACLU to the Sierra Club--seeking relief for purported injuries to themselves or their members. Clearly an organization or association has standing to sue for injuries suffered in its own right.[375] In the absence of injury to itself, an organization or association may have standing to sue on behalf of its members when "(a) its members have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[376] A mere "abstract concern" or "special interest" in a public issue, however, is not sufficient to confer organizational standing.[377]

> The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought the suit. . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.[378]

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[375]See, e.g., Immigration and Naturalization Service v. Legalization Assistance Project of the Los Angeles County Federation of Labor, 510 U.S. 1301 (1993); Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79 (1982); NAACP v. Alabama, 357 U.S. 449, 458-60 (1958); Humane Society of the United States v. Babbitt, 46 F.3d 93 (D.C. Cir. 1995); EEOC v. Nevada Resort Ass'n, 792 F.2d 882, 885 (9th Cir. 1986).

[376]Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). See also Lujan v. National Wildlife Federation, 497 U.S. 871 (1990); International Union, UAW v. Brock, 477 U.S. 274, 282 (1986); Humane Soc'y v. Hodel, 840 F.2d 45, 58 (D.C. Cir. 1988) (germaneness standard is undemanding).

[377]Olagues v. Russoniello, 770 F.2d 791, 798 (9th Cir. 1985).

[378]Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 342-43 (1977). See also Lujan v. National Wildlife Federation, 497 U.S. 871 (1990); International Union, UAW v. Brock, 477 U.S. 274, 281 (1986); Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931, 939 n.10 (D.C. Cir. 1986); Bittner v. Secretary of Defense, 625 F. Supp. 1022, 1024-26 (D.D.C. 1986).

c. Political Question Prong.

(1) General. The second ingredient of justiciability involves the separation of powers doctrine and the policy of judicial self-restraint. Federal courts will not intrude into areas committed by the Constitution to the political--i.e., Legislative and Executive--branches of the Government.[379]

(2) Identifying Political Questions. In addressing this aspect of justiciability, courts will analyze the facts of a case to determine whether, notwithstanding the fact that an actual controversy exists, the fundamental issue is a "political question" that is inappropriate for resolution in a judicial forum.[380] In the landmark case of Baker v. Carr,[381] the Supreme Court defined the elements that serve to identify nonjusticiable political questions. At least one of the facts must be present before the lawsuit can be dismissed as nonjusticiable:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

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[379]C. Wright, supra note 11, at 84; see also L. Tribe, supra, note 13, at 79.

[380]See, e.g., Flast v. Cohen, 392 U.S. 83 (1942); Murphy v. United States, 993 F.2d 871 (Fed. Cir. 1993); McIntyre v. O'Neill, 603 F. Supp. 1053, 1058 (D.D.C. 1985).

[381]369 U.S. 186, 210 (1962).

More recently, Justice Powell, concurring in Goldwater v. Carter,[382] summarized the relevant factors as follows:

> [T]he doctrine incorporates three inquiries: (1) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?

(3) Justiciability and the Armed Forces. Because the Constitution entrusts the regulation and the use of the armed forces to the Congress and the President,[383] the political question prong of justiciability is especially important in lawsuits involving the military. The Supreme Court opinion in Gilligan v. Morgan is illustrative:

GILLIGAN v. MORGAN
413 U.S. 1 (1973)

Mr. Chief Justice Burger delivered the opinion of the Court.

> Respondents, alleging that they were full-time students and officers in the student government at Kent State University in Ohio, filed this action in the District Court on behalf of themselves and all other students on October 15, 1970. The essence of the complaint is that, during a period of civil disorder on and around the University campus in May 1970, the National Guard, called by the Governor of Ohio to preserve civil order and protect public property, violated students' rights of speech and assembly and caused injury to a number of students and death to several, and that the actions of the National Guard were without legal justification. They sought injunctive relief against the Governor to restrain him in the future from prematurely ordering National Guard troops to duty in civil disorders and an injunction to restrain leaders of the National Guard from future violation of the students' constitutional rights. They also

[382]444 U.S. 996, 998 (1979).

[383]U.S. Const., art., I, § 8, art. II, §§ 1-3.

sought a declaratory judgment that § 2923.55 of the Ohio Revised Code is unconstitutional. The District Court held that the complaint failed to state a claim upon which relief could be granted and dismissed the suit. The Court of Appeals unanimously affirmed the District Court's dismissal with respect to injunctive relief against the Governor's "premature" employment of the Guard on future occasions and with respect to the validity of the state statute. At the same time, however, the Court of Appeals, with one judge dissenting, held that the complaint stated a cause of action with respect to one issue which was remanded to the District Court with directions to resolve the following question:

> "Was there and is there a pattern of training, weaponry and orders in the Ohio National Guard which singly or together require or make inevitable the use of fatal force in suppressing civilian disorders when the total circumstances at the critical time are such that nonlethal force would suffice to restore order and the use of lethal forces is not reasonably necessary."

We granted certiorari to review the action of the Court of Appeals.

We note at the outset that since the complaint was filed in the District Court in 1970, there have been a number of changes in the factual situation. At the oral argument, we were informed that none of the named respondents is still enrolled in the University. Likewise, the officials originally named as party defendants no longer hold offices in which they can exercise any authority over the State's National Guard, although the suit is against such parties and their successors in office. In addition, both the petitioners, and the Solicitor General appearing as amicus curiae, have informed us that since 1970 the Ohio National Guard has adopted new and substantially different "use-of-force" rules differing from those in effect when the complaint was filed; we are also informed that the initial training of National Guard recruits relating to civil disorder control has been revised.

Respondents assert, nevertheless, that these changes in the situation do not affect their right to a hearing on their entitlement to injunctive and supervisory relief. Some basis therefore exists for a conclusion that the case is now moot; however, on the record before us we are not prepared to resolve the case on that basis and therefore turn to the important question whether the claims alleged in the complaint as narrowed by the Court of Appeals remand are justiciable.

We can treat the question of justiciability on the basis of an assumption that respondents' claims, within the framework of the remand order, are true and could be established by evidence. On that assumption we address the question whether there is any relief a District Court could appropriately fashion.

It is important to note at the outset that this is not a case in which damages are sought for injuries sustained during the tragic occurrence at Kent State. Nor is it an action seeking a restraining order against some specified and imminently threatened unlawful action. Rather, it is a broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard. This far-reaching demand for relief presents important questions of justiciability.

Respondents continue to seek for the benefit of all Kent students a judicial evaluation of the appropriateness of the "training, weaponry and orders" of the Ohio National Guard. They further demand and the Court of Appeals remand would require that the District Court establish standards for the training, kind of weapons, scope and kind of orders to control the actions of the National Guard. Respondents contend that thereafter the District Court must assume and exercise a continuing judicial surveillance over the Guard to assure compliance with whatever training and operations procedures may be approved by that court. Respondents press for a remedial decree of this scope, even assuming that the recently adopted changes are deemed acceptable after an evidentiary hearing by the court. Continued judicial surveillance to assume compliance with the changed standards is what respondents demand.

In relying on the Due Process Clause of the Fourteenth Amendment, respondents seem to overlook the explicit command of Art. I, § 8, cl 16, which vests in Congress the power:

"To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." (Emphasis added.)

The majority opinion in the Court of Appeals does not mention this very relevant provision of the Constitution. Yet that provision is explicit that the Congress shall have the responsibility for organizing, arming and disciplining the Militia (now the National Guard), with certain responsibilities being reserved to the respective States. Congress has enacted appropriate legislation pursuant to Art. I, § 8, cl 16, and has also authorized the President--as the Commander-in-Chief of the Armed Forces--to prescribe regulations governing organization and discipline of the National Guard. The Guard is an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war. The Guard also may be federalized in addition to its role under state governments, to assist in controlling civil disorders. The relief sought by respondents, requiring initial judicial review and continuing surveillance by a federal court over the training, weaponry and orders of the Guard, would therefore embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government.

The Court of Appeals invited the District Court on remand to survey certain materials not then in the record of the case:

> "[F]or example: Prevention and Control of Mobs and Riots, Federal Bureau of Investigation, U.S. Dept. of Justice, J. Edgar Hoover (1967) . . ., 32 C.F.R. § 501 (1971), 'Employment of Troops in Aid of Civil Authorities'; Instructions for Members of the Force at Mass Demonstrations, Police Department City of New York (no date); Report of the National Advisory Commission on Civil Disorders (1968)." 456 F.2d, at 614.

This would plainly and explicitly require a judicial evaluation of a wide range of possibly dissimilar procedures and policies approved by different law enforcement agencies or other authorities; and the examples cited may represent only a fragment of the accumulated data and experience in the various States, in the armed services, and in other concerned agencies of the Federal Government. Trained professionals, subject to the day to day control of the responsible civilian authorities, necessarily must make comparative judgments on the merits as to evolving methods of training, equipping, and controlling military forces with respect to their duties under the Constitution. It would be inappropriate for a district judge to undertake this responsibility, even in the unlikely event that he possessed requisite technical competence to do so.

Judge Celebrezze in dissent correctly read Baker v. Carr when he said:

> "I believe that the congressional and executive authority to prescribe and regulate the training and weaponry of the National Guard, as set forth above, clearly precludes any form of judicial regulation of the same matters. (Emphasis added.) I can envision no form of judicial relief which, if directed at the training and weaponry of the National Guard, would not involve a serious conflict with a 'coordinate political department; . . . a lack of judicially discoverable and manageable standards for resolving [the question]; . . . the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; . . . the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; . . . an unusual need for unquestioning adherence to a political decision already made; [and] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Baker v. Carr, supra, 369 U.S. at 217. . . .

> "Any such relief, whether it prescribed standards of training and weaponry or simply ordered compliance with the standards set by the Congress and/or the Executive, would necessarily draw the courts into a nonjusticiable political question, over which we have no jurisdiction." 456 F.2d, at 619. (Emphasis added.)
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> In Flast v. Cohen, 392 U.S. 83 (1968), this Court noted that:
>
> "[J]usticiability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is prescribed when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action. Yet it remains true that [j]usticiability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures. . . . Poe v. Ullman, 367 U.S. 497, 508 (1961)."

In determining justiciability, the analysis in Flast thus suggests that there is no justiciable controversy (a) "when the parties are asking for an advisory opinion," (b) "when the question sought to be adjudicated has been mooted by subsequent developments," and (c) "when there is no standing to maintain the action." As we noted in Poe v. Ullman, 367 U.S. 497 (1961), and repeated in Flast, "[j]usticiability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures. . . ." 367 U.S., at 508.

In testing this case by these standards drawn specifically from Flast, there are serious deficiencies with respect to each. The advisory nature of the judicial declaration sought is clear from respondents' argument and indeed from the very language of the Court's remand. Added to this is that the nature of the questions to be resolved on remand are subjects committed expressly to the political branches of government. These factors when coupled with the uncertainties as to whether a live controversy still exists and the infirmity of the posture of respondents as to standing renders the claim and the proposed issues on remand nonjusticiable.

It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches, directly responsible--as the Judicial Branch is not--to the elective process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition,

training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of government which are periodically subject to electoral accountability. It is this power of oversight and control of military forces by elected representatives and officials which underlies our entire constitutional system; the majority opinion of the Court of Appeals failed to give appropriate weight to this separation of powers.

Voting rights cases such as Baker v. Carr, 369 US 186 (1962); Reynolds v. Sims, 377 US 533 (164), and prisoner rights cases such as Haines v. Kerner, 404 US 519 (1972), are cited by the court as supporting the "diminishing vitality of the political question doctrine." Yet because this doctrine has been held inapplicable to certain carefully delineated situations it is no reason for federal courts to assume its demise. The voting rights cases, indeed, have represented the Court's efforts to strengthen the political system by assuring a higher level of fairness and responsiveness to the political processes, not the assumption of a continuing judicial review of substantive political judgments entrusted expressly to the coordinate branches of government.

In concluding that no justiciable controversy is presented, it should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief. We hold only that no such questions are presented in this case. We decline to require a United States district court to involve itself so directly and so intimately in the task assigned that court by the Court of Appeals. Orloff v. Willoughby, 345 US 83, 94-94, 97 (1953).

Reversed.

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(4) Deployment of Military Forces. Cases involving challenges to the commitment and manner of use of the armed forces provide the quintessential application of the political question prong of justiciability. Historically, courts have refused to intrude into the decisions of the political branches to use military force, regardless of the absence of a formal declaration of war.[384] More than

[384]E.g., Johnson v. Eisentrager, 339 U.S. 763, 789 (1950); Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30-31 (1827); Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800); Vanderheyden v. Young, 11 Johns. 150, 157-58 (N.Y. 1814). Compare Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)

footnote continued next page

70 lawsuits were brought challenging American military involvement in Vietnam and Southeast Asia.[385] The fact the war was "undeclared" was frequently brought to the federal judiciary's attention. In no case, however, did the courts hold the involvement unconstitutional, and "most of the courts refused to reach the merits of the constitutional issue by finding that the suits raised a political question or were otherwise nonjusticiable."[386] American military involvement since Vietnam similarly has been the subject of lawsuits challenging the use of the armed forces. An example of such litigation is Greenham Women Against Cruise Missiles v. Reagan, a lawsuit challenging American deployment of missiles in Great Britain.

GREENHAM WOMEN AGAINST CRUISE MISSILES v.
REAGAN
591 F. Supp. 1332 (S.D.N.Y. 1984),
aff'd, 755 F.2d 34 (2d Cir. 1985)

MEMORANDUM OPINION
AND ORDER

EDELSTEIN, District Judge.

> Plaintiffs in this action fall into three distinct categories: British women who live within a 100 mile radius of the United States Air Force Base in Greenham Common, Great Britain, suing on their own behalf and on behalf of their minor children, and an association of these women ("Greenham plaintiffs"); a United States citizen living in London, Deborah Law; and two United States Congressmen, Ronald Dellums of California and Ted Weiss of New York ("congressional plaintiffs"). Plaintiffs seek to

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(..continued)
(President's decision to seize steel industries without congressional approval during Korean War presented justiciable controversy).

[385]C. Wright, supra note 11 at 89.

[386]Id. E.g., Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971); Orlando v. Laird, 443 F.2d 1039 (2d Cir.), cert. denied, 404 U.S. 869 (1971); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir. 1967), cert. denied, 387 U.S. 945 (1968).

enjoin the deployment of ninety-six Ground Launched Cruise Missiles ("cruise missiles") at the United States Air Force Base in Greenham Common, which is located approximately 60 miles west of London. They contend that the deployment of the cruise missiles will create a substantial risk of a nuclear war initiated by either the United States or the Soviet Union, or of a nuclear accident. From this premise, those plaintiffs living near Greenham Common allege that the deployment of these missiles constitutes tortious injury and violates rights granted by the fifth and ninth amendments to the United States Constitution. The congressional plaintiffs allege that deployment violates their constitutional right as members of Congress to declare war and provide for the general defense and welfare.

The defendants have moved pursuant to Fed. R. Civ. P. 12(b) to dismiss the complaint for lack of subject matter jurisdiction and for lack of standing.

## BACKGROUND

The decision to deploy cruise missiles at a United States Air Force Base in Greenham Common, Great Britain was the result of a planning meeting held in January 1979 between the United States President, the British Prime Minister, the French President and the West German Chancellor. It is part of a broader plan to modernize the nuclear forces of the North Atlantic Treaty Organization ("NATO") and to provide a more adequate defense for Western Europe. The deployment decision was jointly made by President Jimmy Carter and our NATO allies in December 1979. See N.Y. Times, Dec. 13, 1979, at Al, col. 6. Congress over the years has appropriated funds for this plan.

The Cruise Missile is a jet aircraft that navigates itself without a pilot or human assistance. This pilotless jet checks its radar signals against a map of the terrain stowed in an onboard computer. These small, solid-fueled, pilotless missiles are designed to travel at subsonic speeds at very low altitudes, and with a range of up to 1,500 miles. While they do not have an intercontinental range, they can be carried to the border of the Soviet Union by B-52s and launched from the air.

The plaintiffs allege that the cruise missile system, the product of a number of technological innovations in nuclear weapon design, has three significant advantages over other nuclear weapons. The mobility of cruise missile launchers make it more difficult to destroy the missiles in an attack on their base. Plaintiffs' Memorandum in Support of Motion for a Temporary Restraining Order at 13 ("Plaintiffs' TRO Memo"). Once launched, cruise missiles are difficult to detect in flight, in part because the missiles can delay radar detection by flying at low altitudes for extended periods of time. Complaint, para. 34; Plaintiffs' TRO Memo at 14-15. Finally, cruise missiles achieve

great accuracy as a result of a sophisticated guidance system. Complaint, para. 36, 41; Plaintiffs' TRO Memo at 15-16.

On November 9, 1983, plaintiffs filed this action to enjoin the deployment of ninety-six cruise missiles at Greenham Common. Plaintiffs assert that deployment of the cruise missiles will render nuclear war and accident likely, if not inevitable. Three explanations are offered in support of this contention. First, plaintiffs point to the longstanding United States' policy of "first use"--the willingness in the event any NATO member is attacked to use nuclear weapons if necessary to repel the attack. Plaintiffs assert that the deployment of cruise missiles translates this willingness on the part of the United States to use nuclear weapons first into a capability to do so. Plaintiffs contend that this combination of willingness and capability makes it likely that the United States will in fact initiate a "limited" nuclear war. Second, plaintiffs opine that even if the United States does not initiate a nuclear exchange, this new capability for "first use" will likely provoke a preemptive nuclear attack against the missiles by the Soviet Union. Finally, plaintiffs contend that the possibility of an accidental thermonuclear detonation of a missile on the ground or of an accidental detonation of the high explosive component of the warhead increases the likelihood of nuclear disaster on British soil.

Based on these alleged consequences of deployment, the Greenham plaintiffs contend that the deployment of cruise missiles contravenes several customary norms of international law, subjecting them to tortious injury actionable under the Alien Tort Claims Act, 28 U.S.C. § 1350. The Greenham plaintiffs join plaintiff Deborah Law, a United States citizen who lives in London, in alleging that deployment violates their rights guaranteed by the fifth and ninth amendments to the United States Constitution. Plaintiffs Ted Weiss and Ronald Dellums, who are United States Congressmen, allege that deployment violates their constitutional right and responsibility as members of Congress to declare war and provide for the general defense and welfare.

. . . .

The defendants have moved pursuant to Fed. R. Civ. P. 12(b) to dismiss the complaint, arguing that all plaintiffs' claims are nonjusticiable because the action raises political questions, the congressional plaintiffs' claim lacks ripeness, and all plaintiffs lack standing. . . .

## DISCUSSION

This court is asked to decide whether the instant action presents a justiciable controversy. The Constitution extends the judicial power to those "cases" and "controversies" specifically enumerated in Article III; matters not within the category of "cases" or "controversies" cannot be entrusted to courts under Article III of the

Constitution. Comprehended within the limitations imposed by these terms are constitutional and prudential concerns about the proper role of the courts in dispute resolution and the allocation of power among the three branches of our government. These concerns find definition in various doctrines of justiciability including that doctrine which restricts the judiciary from deciding political questions.

"Ever since Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), the federal courts have declined to judge some actions of the Executive and some interactions between the Executive and Legislative branches where it is deemed inappropriate that the judiciary intrude." Holtzman v. Schlesinger, 484 F.2d 1307, 1309 (2d Cir. 1973), cert. denied, 416 U.S. 936, 94 S. Ct. 1935, 40 L. Ed. 2d 286 (1974). The most authoritative and commonly cited formulation of the political question doctrine is that of Justice Brennan in the seminal case of Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 710,7 L. Ed. 2d 663 (1961).

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

If one of these conditions is inextricable from the case at bar, then adjudication of the case may be said to require resolution of a political question, which is nonjusticiable and hence not reviewable by a court. Id.

This case does not present a political question under the first of the six categories enumerated in Baker--the constitutional commitment of the issue presented to a political branch. Defendants contend that the question presented here involves "the President's exercise of the power to conduct the foreign relations of the United States." Defendants' Memorandum of Law, at 10. Since the President's foreign policy powers derive from his constitutional authority as Chief Executive and Commander-in-Chief of the armed forces, defendants opine that the issue before the court is committed by the Constitution to the Executive and therefore is a nonjusticiable political question.

Defendants misapprehend the issues to be adjudicated. Looking at the pleadings in the light most favorable to the plaintiffs, this court is not asked to determine

the foreign policy of the United States. Plaintiffs do not ask this court to decide the wisdom, morality, or efficacy of the decision to deploy cruise missiles at Greenham Common. The responsibility for that decision lies with the Executive and Legislative branches of the government. Plaintiffs ask this court to determine the legality of the challenged action. In particular, they ask the court; to adjudicate torts, to protect constitutional rights of citizens and noncitizens under United States control, and to enforce the constitutional mandate of separation of powers. The Constitution commits the resolution of these issues to the courts, and not to a coordinate political department.

Having decided that this action does not belong to the first Baker category, the court now considers whether there is a lack of judicially discoverable and manageable standards, the second category enumerated in Baker. In briefs and at argument, plaintiffs de-emphasize the significance of the second as well as the other remaining Baker categories. They argue that the first of the six Baker categories is the critical one because it involves the constitutional power of the court to decide certain issues, whereas the remaining five merely involve prudential considerations and call for discretionary judgments. Plaintiffs further point out that in two decisions the Supreme Court, having determined that the issue presented was not textually committed to a political branch, dismissed the remaining Baker categories in "short order." Plaintiffs opine that this summary treatment of the last five categories indicates that they are secondary and less important than the first. See Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss at 23-28; Transcript of Argument on Nov. 22, 1983, at 40.

This argument flies in the face of a line of post-Baker precedent. In DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973), for example, the Second Circuit Court of Appeals found the lack of judicially discoverable and manageable standards sufficient grounds for dismissing a suit as a political question. There an inductee in the United States Army alleged the President's decision to mine harbors and bomb targets in North Vietnam constituted, in the absence of congressional authorization, an illegal escalation of the war. The Second Circuit held that this suit presented a nonjusticiable political question, relying exclusively on its finding that the court is "incapable of assessing the facts" and "lack[s] discoverable and manageable standards" to resolve the issue. Id. at 1155. The court dismissed the action, noting that dismissal for lack of judicially discoverable and manageable standards is mandatory under Baker, not discretionary.

> [W]e are at a loss to understand how a court may decide a question when there are no judicially discoverable or manageable standards for resolving it. . . . [W]here all agree that standards are presently unavailable, the court has no alternative but to dismiss for lack of jurisdiction. This conclusion is not reached by the exercise of discretion, but rather of necessity.

Id. at 1153-54.

Similarly, in Holtzman v. Schlesinger, 474 F.2d 1307 (2d Cir. 1973), cert. denied, 416 U.S. 936, 94 S. Ct. 1935, 40 L. Ed. 2d 286 (1974), plaintiffs challenged bombing and other military activity in Cambodia. The Second Circuit reversed the decision of the district court granting summary judgment for plaintiffs and directed the district court to dismiss the complaint, holding that it presented a nonjusticiable political question. The Court of Appeals particularly objected to the lower court's finding that the bombing of Cambodia, after the removal of American forces and prisoners of war from Vietnam, represented "a basic change in the situation, which must be considered in determining the duration of prior Congressional authorization" and that such action constituted a tactical decision not traditionally confided to the President. Id. at 1310. Relying on its earlier DaCosta decision, the court stated that "[t]hese are precisely the questions of fact involving military and diplomatic expertise not vested in the judiciary, which make the issue political and thus beyond the competence of [the lower] court or this court to determine." Id.

More recently, the Court of Appeals for the District of Columbia found the second Baker category to be controlling in Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam). A group of congressmen, including instant plaintiffs Dellums and Weiss, asked a federal court to rule, inter alia, that United States aid, military equipment and advisors had been introduced into situations in El Salvador in which "imminent involvement in hostilities" was clearly indicated and, hence, the President's failure to report such facts to the Congress violated the War Powers Resolution and the war powers clause of the Constitution. The district court dismissed the action on the ground that the war powers issue presented a nonjusticiable political question. Crockett v. Reagan, 558 F. Supp. 893, 898 (D.D.C. 1982). The lower court found that it lacked the resources and expertise to resolve the particular factual disputes involved and that such determinations "are appropriate for congressional, not judicial, investigation and determination." Id. On appeal, the United States Court of Appeals ruled that it could find no error in the district court's judgment and affirmed "for the reasons stated by the District Court." 720 F.2d at 1357.

In the instant case, the plaintiffs ask this court to make determinations that are further beyond judicial resources and expertise than those faced by the DaCosta, Holtzman and Crockett courts. A review of plaintiffs' pleadings and exhibits reveals that if the merits were reached, the court would have to determine whether the United States by deploying cruise missiles is acting aggressively rather than defensively, increasing significantly the risk of incalculable death and destruction rather than promoting peace and stability.

The courts are simply incapable of determining the effect of the missile deployment on world peace. Plaintiffs ask this court to find that since the cruise missiles can be used in a "first use" situation, the risk that the United States will in fact initiate a limited nuclear war increases terribly; and that even if the United States does not initiate a nuclear exchange, this new capability for "first use" will likely provoke a preemptive nuclear strike by the Soviet Union. In contrast, the government takes the position that the deployment of cruise missiles promotes peace by providing a more adequate and needed defense for Western Europe thereby deterring the Soviet Union from initiating war and by motivating the Soviet Union to negotiate arms reduction seriously. "History will tell [which] assessment [is] correct, but without the benefit of such extended hindsight [the courts] are powerless to know." DaCosta v. Laird, supra, 471 F.2d at 1155.

Undoubtedly it can be said that the President and Congress cannot "know" with an absolute degree of certainty the effects of missile deployment. But it is precisely because the ultimate effects are not altogether knowable that conjecture and predictions about them are best left to the political branches of government. Questions that are infinitely more complicated than those posed by the question "how many angels can dance on the head of a pin?" are not ready for ready answers. Questions like how to ensure peace, how to promote prosperity, what is a fair utilization and distribution of economic resources are examples of questions that must be decided by the fair, sound, seasoned and mature judgments of men and women responsive to the common good. The power to make these determinations is therefore appropriately allocated to the political branches.

Furthermore, courts are just not on an equal footing with the political branches to determine the likely consequences of missile deployment. The information pertinent to such determinations would prove unmanageable for the court. White House, Department of State, Department of Defense, Central Intelligence Agency, and congressional sources, not to mention a number of foreign governments, would all possess information relevant to this court's inquiry. Much of this information would, of necessity, be privileged, while other information would be difficult to ascertain or wholly unavailable to the court. As the court in Holtzman aptly noted, "[the court is] not privy to the information supplied to the Executive by his professional military and diplomatic advisors and even if [it] were, [the court is] hardly competent to evaluate it." Holtzman v. Schlesinger, supra, 484 F.2d at 1310.

The court concludes that the factfinding that would be necessary for a substantive decision is unmanageable and beyond the competence and expertise of the judiciary. This action therefore clearly belongs to the second category enumerated in Baker.

The lack of judicially discoverable and manageable standards is not the only reason this case is nonjusticiable. The nature of the relief plaintiffs seek directly impinges upon the foreign policy of the United States. Plaintiffs ask the court to enjoin the deployment of cruise missiles at Greenham Common. This relief, if granted, would directly alter the military and foreign policy of the United States with its NATO allies and military and diplomatic relations with the Soviet Union. The particular delicacy of foreign affairs weighs against intervention by the court. As the Supreme Court stated in the now oft-quoted passage from Chicago & Southern Airlines v. Waterman Steamship Co., 333 U.S. 103, 111, 68 S. Ct. 431, 436, 92 L. Ed. 568 (1948):

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

See also United States v. First National City Bank, 396 F.2d 897, 901 (2d Cir. 1968) ("The courts must take care not to impinge upon the prerogatives and responsibilities of the political branches of the government in the extremely sensitive and delicate area of foreign policy.").

Although not "every case or controversy which touches foreign relations lies beyond judicial cognizance." Baker v. Carr, 369 U.S. 186, 211, 82 S. Ct. 691, 707, 7 L. Ed. 2d 663 (1962), this case surely does. Our relations with foreign countries would be seriously disrupted if the federal courts exercised supervision and control over such critical elements of our foreign policy as the deployment of cruise missiles. It is difficult to imagine how the United States could influence the policies of foreign governments through diplomatic means if the actions of the political branches could be subject to public review and rejection by United States courts.

Moreover, the relief plaintiffs request could lead to "consequences in our foreign relations completely beyond the ken and authority of this Court to evaluate." Atlee v. Laird, 347 F. Supp. 689, 705 (E.D. Pa. 1972), aff'd mem., 411 U.S. 911, 93 S. Ct. 1545, 36 L. Ed. 2d 304 (1973). The deployment decision involved an extremely subtle balancing process which took into account a complex of factors of national and international character. The process by which such a decision is reached must be flexible and depends upon the proper functioning of the political system. Only the Executive and Legislative branches have the facility for making such policy decisions

and for predicting their beneficial or detrimental effects on the international posture of the United States and its allies.

For instance, enjoining cruise missile deployment could engender serious discord among our allies and unravel the carefully balanced deployment scheme. It could encourage the USSR to intensify its pressure for unilateral Western concessions which would seriously erode NATO's ability to deter Moscow's growing nuclear threat or discourage Soviet willingness to reach an arms control agreement. Whether any or all of these potentialities might be realized cannot be predicted which, of course, supports the finding that the case is nonjusticiable.

This is not the first time that the courts have been asked to enjoin the Executive or Legislature from carrying out a nuclear weapons program. In Pauling v. McNamara, 331 F.2d 796 (D.C. Cir. 1963), cert. denied, 377 U.S. 933, 84 S. Ct. 1336, 12 L. Ed. 2d 297 (1964), a case substantially similar in fact and principle to the one at bar, an action was brought on behalf of 115 United States citizens and more than 100 aliens, including eight Nobel Laureates. The plaintiffs in Pauling sought to enjoin the government from detonating nuclear weapons for purposes of testing, alleging that such nuclear testing caused plaintiffs to be damaged genetically, somatically, and psychologically. The action was dismissed because "decisions in the large matters of basic national policy, as of foreign policy, present no judicially cognizable issues and hence the courts are not empowered to decide them." Id. at 798.

The language of then Circuit Judge Warren E. Burger is very much in point here:

> That appellants now resort to the courts on a vague and disoriented theory that judicial power can supply a quick and pervasive remedy for one of mankind's great problems is no reason why we as judges should regard ourselves as some kind of Guardian Elders ordained to review the political judgments of elected representatives of the people. In framing policies relating to the great issues of national defense and security, the people are and must be, in a sense, at the mercy of their elected representatives. But the basic and important corollary is that the people may remove their elected representatives as they cannot dismiss United States Judges. This elementary fact about the nature of our system, which seems to have escaped notice occasionally must make manifest to judges that we are neither gods nor godlike, but judicial officers with narrow and limited authority. Our entire System of Government would suffer incalculable mischief should judges attempt to interpose the judicial will above that of the Congress and President, even were we so bold as to assume that we can make a better decision on such issues.

Id. at 799.

CONCLUSION

The instant case presents a nonjusticiable political question. It is therefore not necessary to reach the other asserted bases for dismissal, ripeness and standing. Defendants' motion to dismiss the complaint is hereby ordered.

SO ORDERED.[387]

(5) Other Examples. The political question prong of justiciability has also precluded judicial intervention into such areas as negotiations with foreign governments, including the

[387] See also Tiffany v. United States, 931 F.2d 271 (4th Cir. 1991) (claims by private pilot killed in accident with intercepting Air Force jet after entering air defense identification zone without a filed flight plan are not justiciable), cert. denied, 502 U.S. 1030 (1992); Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990) (deployment of forces in support of Operation Desert Shield nonjusticiable); Nejad v. United States, 724 F. Supp. 753, 755 (C.D. Cal. 1989) (claims arising out of downing Iran Air Flight 655 by U.S.S. Vincennes are not justiciable); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208 (D.C. Cir. 1985) (challenge to support of Nicaraguan Contras dismissed, in part, as nonjusticiable); In re Korean Air Lines Disaster of Sept. 1, 1983, 597 F. Supp. 613, 616-17 (D.D.C. 1984) (American aircraft reconnaissance activities near Soviet Union nonjusticiable); Conyers v. Reagan, 578 F. Supp. 324 (D.D.C. 1984), vacated as moot, 765 F.2d 1124 (D.C. Cir. 1985) (intervention in Grenada nonjusticiable); Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), aff'd, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984) (military assistance to El Salvador nonjusticiable); Rappenecker v. United States, 509 F. Supp. 1024 (N.D. Cal. 1980) (Mayaguez rescue operation nonjusticiable). Cf. De Arellano v. Weinberger, 788 F.2d 762, 764 (D.C. Cir. 1986) (suit to enjoin expropriation of American landowner's property in Honduras for use as American military training facility dismissed in part because of political questions involved); Kline v. Republic of El Salvador, 603 F. Supp. 1313, 1321 (D.D.C. 1985) (conduct of State Department investigation into alleged murder of an American citizen by Salvadoran soldiers should not be judicially reviewed). But see Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988) (political question doctrine not a bar to claims that U.S. support of Nicaraguan contras violated plaintiffs' fifth amendment rights); Dellums v. Bush, 752 F. Supp. 1141, 1144-46 (D.D.C. 1990) (request for injunction by members of Congress to prevent President from going to war against Iraq without first securing explicit congressional authorization not barred by political question doctrine).

extension and implementation of diplomatic relations,[388] making political appointments,[389] negotiations involving the repatriation of US citizens held as prisoners or POWs,[390] the decision to enter agreements with foreign governments,[391] the implementation of treaty obligations,[392] the establishment of academic standards at service academies,[393] the creation of promotion quotas,[394] the enforcement of accession standards by the Army Judge Advocate General's Corps,[395] and the general conduct of military

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[388]Phelps v. Reagan, 812 F.2d 1293 (10th Cir. 1987); Americans United for Separation of Church & State v. Reagan, 786 F.2d 194, 201-02 (3d Cir.), cert. denied, 479 U.S. 1012 (1986).

[389]National Treasury Employees Union v. Bush, 715 F. Supp. 405 (D.D.C. 1989).

[390]United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936); Flynn v. Schultz, 748 F.2d 1186, 1191-93 (7th Cir. 1984), cert. denied, 474 U.S. 830 (1985); Dumas v. President of the United States, 554 F. Supp. 10 (D. Conn. 1982). Smith v. Reagan, 844 F.2d 195, (4th Cir. 1988), cert. denied, 488 U.S. 954 (1988).

[391]Cranston v. Reagan, 611 F. Supp. 247 (D.D.C. 1985).

[392]Compare Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972), cert. denied, 409 U.S. 869 (1972), with Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 230 (1986); Weinberger v. Rossi, 456 U.S. 25 (1982); and Rainbow Navigation, Inc. v. Department of the Navy, 620 F. Supp. 534, 543 (D.D.C. 1985), aff'd, 783 F.2d 1072 (D.C. Cir. 1986). A claim is not rendered nonjusticiable simply because it deals with foreign policy. E.g., Regan v. Wald, 468 U.S. 222 (1984); Dames & Moore v. Regan, 453 U.S. 654 (1981); Committee of U.S. Citizens Living in Nicaragua v. Regan, 859 F.2d 929 (D.C. Cir. 1988); Population Inst. v. McPherson, 797 F.2d 1062, 1070 (D.C. Cir. 1986).

[393]Green v. Lehman, 544 F. Supp. 260 (D. Md. 1982), aff'd, 744 F.2d 1049 (4th Cir. 1984).

[394]Blevins v. Orr, 553 F. Supp. 750 (D.D.C. 1982), aff'd, 721 F.2d 1419 (D.C. Cir. 1983).

[395]Whittle v. United States, 7 F.3d 1259 (6th Cir. 1993).

intelligence gathering activities.[396] It has not, however, prevented litigation over press restrictions imposed during time of war.[397]

[396]Compare Laird v. Tatum, 408 U.S. 1 (1972), and United Presbyterian Church v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984), with Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976).

[397]See, e.g., Nation Magazine v. U.S. Department of Defense, 762 F. Supp. 1558, 1566-68 (S.D.N.Y. 1991) (rejecting the government's political question argument, although denying the injunction sought as the war's end made the issue moot).